

Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of *General Telephone v. Falcon*¹

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I. INTRODUCTION	608
II. HISTORY OF THE CLASS ACTION.....	612
A. <i>The English Precedent in the Medieval Period to 1500</i>	612
B. <i>The English Early Modern Period to 1850</i>	614
C. <i>The American Precedent to 1938</i>	619
III. DUE PROCESS APPLIED TO CLASS ACTIONS	627
IV. ORIGINAL FEDERAL RULE OF CIVIL PROCEDURE 23	631
V. AMENDED RULE 23 AND ADEQUACY OF REPRESENTATION	635
A. <i>The Language of Amended Rule 23 and Adequacy of Representation</i>	635
B. <i>The Impact of Amended Rule 23 on Identity of Claims from 1966 to General Telephone</i>	636
1. <i>Commonality</i>	636
2. <i>Typicality</i>	639
3. <i>Adequacy of Representation Prior to General Telephone</i>	644
VI. CLASS ACTION CATEGORIES AND THE WEAKENING OF NOTICE RIGHTS UNDER AMENDED RULE 23	647
A. <i>The (b)(1)(A) Category</i>	649
B. <i>The (b)(1)(B) Category</i>	650
C. <i>The (b)(2) Category</i>	652
D. <i>The (b)(3) Category</i>	653
E. <i>The Impact of Categorization</i>	654
VII. <i>GENERAL TELEPHONE CO. V. FALCON</i> AND THE RESTORATION OF THE IDENTITY OF CLAIMS STANDARD.....	657
VIII. CIRCUIT-BY-CIRCUIT ANALYSIS OF THE IMPACT OF <i>GENERAL TELEPHONE</i>	660
A. <i>First Circuit</i>	661
B. <i>Second Circuit</i>	662
C. <i>Third Circuit</i>	667
D. <i>Fourth Circuit</i>	670
E. <i>Fifth Circuit</i>	672
F. <i>Sixth Circuit</i>	673
G. <i>Seventh Circuit</i>	675
H. <i>Eighth Circuit</i>	678

¹ General Tel. Co. v. Falcon, 457 U.S. 147 (1982).

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I. <i>Ninth Circuit</i>	680
J. <i>Tenth Circuit</i>	681
K. <i>Eleventh Circuit</i>	682
L. <i>District of Columbia Circuit</i>	684
IX. IDENTITY OF CLAIMS AFTER <i>GENERAL TELEPHONE</i>	685
A. <i>Identity of Claims in Antitrust Actions</i>	686
B. <i>Identity of Claims in Mass Torts</i>	688
C. <i>Identity of Claims in Security Cases: Same Misrepresentations or Nondisclosures</i>	690
1. <i>Timing of the Purchases by the Representative and the Class</i>	692
2. <i>Reliance</i>	694
3. <i>Unique Defenses</i>	695
4. <i>Pendent State Law Claims</i>	697
D. <i>Breach of Contract</i>	698
X. THE IMPACT OF <i>GENERAL TELEPHONE</i> ON SPECIFIC CASES AND DECISIONS	699
A. <i>Civil Rights Employment Discrimination</i>	699
B. <i>Biased Testing Procedure Decisions</i>	703
C. <i>General Policy/Subjective Decisionmaking Cases</i>	703
D. <i>Civil Rights (Other than Employment Discrimination)</i>	706
XI. CONCLUSION.....	707
A. <i>Common Course of Conduct: Derogations of the General Telephone Precedent</i>	708
B. <i>Same Legal Theory</i>	708
C. <i>Markedly Different Positions</i>	709
XII. A POSTSCRIPT FOR PERSPECTIVE	710

I. INTRODUCTION

Amended Federal Rule of Civil Procedure 23 was adopted in 1966 to make class actions more available, judicially efficient, and binding.² The device was seen by its proponents as an additional method of enforcing consumer protection, antitrust, and particularly, civil rights laws. The device made even small claims economically viable. Whereas original Rule 23 restricted binding class actions to cases involving "joint or common rights" or actions affecting "specific property," amended Rule 23 relaxed these restrictions, which extended the social and economic uses of the class device.

Amended Rule 23 defined three broad categories for permissible class actions: (b)(1), (b)(2), and (b)(3). By interpretation, almost any case falls within one or more of these categories, provided there is federal subject-matter jurisdiction and the parties are so numerous that joinder is impractical. Constitutional challenges to statutes or governmental practices, patent

² See FED. R. CIV. P. 23 advisory committee's note (1966).

infringement, product liability, school integration, employment discrimination, securities fraud, prisoners' rights, antitrust claims, consumer claims, franchise disputes, as well as breach of contract and mass tort claims are now clearly established as subject to class processes.³

In this period of rapid growth and widespread use of the class device under the amended Rule, concerns of procedural fairness and due process rights of absent members of the class were less clearly focused or ignored. Historically, absent members of the class were protected by the following two legal principles:

A. Adequacy of representation, which included four components:

- (1) The named representatives presented the same claims as the class's claims; the self-interest of the representatives provided motivation to litigate, to prove facts (presumably the event impacting the named representatives was admissible), and to negotiate a settlement that was fair to the entire class.
- (2) The named representatives were competent to present the issues.
- (3) The class counsel was qualified and competent to present the issues.
- (4) There was an absence of conflict between the interests and remedies of the representatives or counsel and the interests and remedies of the class.

If these four components of adequacy of representation were satisfied, class judgments (including settlement judgments) were binding and entitled to full faith and credit. Historically, there was no requirement of notice with opportunity to appear or opt out if the above adequacy of representation requirements were satisfied.

B. Notice to class members giving opportunity to appear or to opt out provided alternative or supplemental protection for the members of the class. If an absent member appeared in the action, adequacy of representation became insignificant because the class member had individually participated. If the absent member opted out, adequacy of representation became insignificant because the judgment was not binding on him, and his property rights were unaffected. If, after notice, the absent class member failed to appear or opt out, adequacy of representation was

³ See *infra* notes 206–327 and accompanying text.

satisfied because the absent member was deemed to have impliedly consented to the representation as described in the notice. In this latter case, the named representative and counsel nevertheless proceeded competently in the presentation of the case and avoided forbidden conflicts of interest.

The above safeguards have been substantially weakened by the language, structure, and application of amended Rule 23.

The role and competency of the named representatives has steadily diminished under amended Rule 23. Representatives neither monitor nor are consulted by class counsel or the court on key decisions. Indeed, recent articles⁴ argue that representatives are mere figureheads and should be abolished altogether. These articles propose that adequacy of class counsel should be the sole element in determining adequacy of representation.⁵

The class counsel's required level of competency has also diminished as a protective device under amended Rule 23. Seldom is there an attack or an examination of the legal competency of class counsel. Ethical rules that protect the class concerning maintenance, solicitation, and fee splitting are largely ignored by the courts, and conflict of interest principles are narrowly construed. Moreover, the scope and nature of settlement sought by the self-interested counsel may differ materially from the interests of the class, yet the settlements, when approved by the courts, are binding on the entire class.

These concerns are not totally resolved by judicial supervision. Court approval may be employed to sweep the due process and fairness issues under the carpet of settlement in proceedings that are more characterized as cheer-leading than judicial inquiry. Moreover, trial court supervision is seldom reviewed by the appellate courts.

The alternative and supplemental protection of notice giving opportunity to appear or opt out has also been reduced by the categorization and ambiguities of the amended Rule. In certain categories of class actions (so called "mandatory" (b)(1) and (b)(2) classes), the historical protection of notice to class members giving opportunity to appear or opt out is not required, although notice may be given by the discretion of the court. Adequacy of representation is significant in such mandatory classes because the member does not have the

⁴ See Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990); Mary K. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385 (1987).

⁵ The articles assume that absent class members would be fully protected by class counsel—an assumption not supported by the federal experience. Furthermore, such a suggestion violates basic due process and "case or controversy" requirements. See generally Burns, *supra* note 4; Kane *supra* note 4.

right to participate individually or opt out; therefore, implied consent cannot be argued as flowing from the failure to exercise such rights.

These mandatory class categories are being used more often by the courts. Initially, any action that sought damages was classified as a (b)(3) class, requiring notice giving opportunity to appear or opt out. Today, however, there is authority that any action that combines damages with injunctive relief should be a mandatory class action. Moreover, mandatory classes based on a "limited fund" ((b)(1)(B)) theory or an "incompatible standards of conduct for the party opposing the class" ((b)(1)(A)) theory are being certified by the courts more often.

In the federal system, several recent mass tort cases illustrate the trend toward mandatory classes. In the *Agent Orange*⁶ litigation, brought on behalf of tens of thousands of Vietnam veterans, the court certified the class under both (b)(3) and (b)(1)(B) and gave notice and opportunity to appear or opt out.⁷ In the original *Dalkon Shield*⁸ case, the lower court certified a mandatory (b)(1)(B) class for some fifteen hundred claimants on the limited issue of punitive damages.⁹ The Ninth Circuit vacated that certification on the ground that the record was inadequate to establish the "limited fund" requirement of a (b)(1)(B) category.¹⁰ However, in 1989 the Fourth Circuit upheld a mandatory class for claimants who asserted that an insurance carrier had engaged in tortious conduct toward Dalkon Shield users.¹¹ The mandatory class was declared binding although no notice was given to the plaintiffs.¹²

Most importantly, the identity of claims requirement was undercut by the uncertain language and structure of the Rule. Historically, identity of claims required a sameness of the essential elements of liability¹³ between

⁶ *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

⁷ *In re "Agent Orange"*, 100 F.R.D. at 728.

⁸ *In re Northern Dist. of Cal. "Dalkon Shield" I.U.D. Prods. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal. 1981), *vacated and remanded*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

⁹ *In re "Dalkon Shield"*, 521 F. Supp. at 1195.

¹⁰ *In re "Dalkon Shield"*, 693 F.2d at 851-52.

¹¹ *In re A.H. Robins Co.*, 880 F.2d 709, 747-48 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

¹² *In re A.H. Robins*, 880 F.2d at 747-48.

¹³ Identity is defined by Webster as "[s]ameness of essential or generic character in different examples or instances" WEBSTER'S NEW INTERNATIONAL DICTIONARY (William A. Nielson et al. eds., 2d ed. 1956). This article uses the "identity of claims" language because other phrases such as "typicality," "nexus," and "homogeneity" have become confused by varying usage. See *infra* notes 120-149 and accompanying text. "Coextensive," "encompassed," or "same" are also possible phrases for post-1982 use.

representative and class claims, although the claims did not need to be identical in every fact or in the amount and nature of the remedy. Such identity on the liability elements ensured that the self-interest of the representative would enure to the benefit of the absent class members. The uncertainty with the amended Rule is that not one but three phrases were chosen—commonality, typicality, and adequacy of representation—that contain elements of the historical identity of claims concept; the relationship between these phrases is not defined. The inconsistency of the phrases is evident in (b)(3) cases. All three requirements are necessary in (b)(3) as well as in (b)(1) and (b)(2) cases even though, by definition, (b)(3) cases may involve uncommon liability issues.¹⁴

As a result of the amended Rule, identity of claims was largely ignored by federal courts between 1966 and 1982, notwithstanding the principle that the Federal Rules shall not “abridge, enlarge or modify any substantive right.”¹⁵ However, in 1982, the historical standard of identity of claims was reaffirmed as a requirement by the United States Supreme Court through its *General Telephone Co. v. Falcon* decision.¹⁶ The cases after 1982, applying, circumventing, and ignoring that decision, are explored at length in this Article.

The central focus of this Article is the identity of claims as a requirement for class certification. The Article begins with a historical description of the development of class actions in England and the United States prior to Rule 23. Then the Article considers the development of the due process and fairness standards, followed by an analysis of amended Rule 23 as applied in the federal court system before and after *General Telephone Co. v. Falcon*.¹⁷ This Article will propose clarifications and modifications of the present law, only some of which may be accomplished by judicial declaration. Other deficiencies call for revision of the Rule itself.

II. HISTORY OF THE CLASS ACTION

A. *The English Precedent in the Medieval Period to 1500*

A variety of rural and town groups, which dominated medieval social and political life, routinely appeared in the English courts as litigants represented

¹⁴ See FED. R. CIV. P. 23.

¹⁵ 28 U.S.C. § 2072(b) (Supp. III 1991).

¹⁶ 457 U.S. 147 (1982).

¹⁷ *Id.*

by members of their group.¹⁸ The villeins of the manor, whose rights and duties ran to the manor lord, the frankpledge group, whose obligations ran to the King, and the parish, whose benefits and duties ran from the parson and the church to the members of the local ecclesiastical unit, regularly appeared as parties in representative actions. Similarly, town groups, including merchant guilds and the boroughs, not only dominated social and political life, but regularly appeared in representative actions. As a practical matter, such suits were effectively binding upon all members of the group.¹⁹ The protection for the absent members of the group included the following:

(1) Each member of the group had an identical, not just similar, right, duty, and interest in the claim.

(2) The competency of the representative was largely assumed based in part on the self-interest of the representative in presenting his identical claim. In any event, the closely knit group tended to monitor their own representatives who were, by and large, the richer or more solid members of the group. Implied consent could be inferred from group association, but this was not extensively relied upon by the courts.²⁰

¹⁸ Recent scholars provide valuable insight into the origin and nature of the representative suit. See, e.g., STEPHEN C. YEAZELL, *MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987) [hereinafter YEAZELL, *MEDIEVAL GROUP LITIGATION*]; Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing YEAZELL, *MEDIEVAL GROUP LITIGATION*); Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515 (1974); George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73 (1984); William Weiner & Delphine Szyndrowski, *The Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935 (1987); Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980) [hereinafter Yeazell, *Part I*]; Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980) [hereinafter Yeazell, *Part II*]; Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

¹⁹ YEAZELL, *MEDIEVAL GROUP LITIGATION*, *supra* note 18, at 41-93.

²⁰ See FREDERIC CALVERT, *A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY* *19-20 (London 1837, reprinted Philadelphia 1837); ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* at 1304 (1950); Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1331 (1976); cf. Yeazell, *Part I*, *supra* note 18, at 515; Yeazell, *Part II*, *supra* note 18, at 1083.

B. *The English Early Modern Period to 1850*

From 1500 to 1850, medieval rural and town groups diminished in importance. Rapid economic development, market capitalization, centralization of political power in the King and Parliament, and a premium placed on individual liberty led to a fundamental shift in litigation responsibilities. The norm in litigation became individual litigant control.²¹ Group litigation was an exception available only in courts of equity.²²

There were two types of cases that equity entertained. The first category of accepted class actions involved adjudication of identical rights or duties and remedies of all members of the class.²³ For example, villeins (later copyholders) or parishioners may have had a disputed duty to pay the manor lord, borough, or King. The same rights and duties applied to each member by reason of his occupancy of the group territory, and the remedy sought by the class similarly affected both the rights and duties of the group and the separate rights and duties of each individual. These rights and duties were part of a "general right" owed from and to the manor lord, borough, or King.²⁴ Although the general right involved separate and distinct rights, it supported

²¹ See *Id.* at 117-54; Bone, *supra* note 18, at 220-23.

²² The Court of Star Chamber offered some relief in group litigation until its demise in the mid-seventeenth century. YEAZELL, *MEDIEVAL GROUP LITIGATION*, *supra* note 18, at 128-31. Common-law courts would not hear claims by unincorporated associations; thus, such groups had to proceed in equity, which only granted declaratory relief. Bone, *supra* note 18, at 221.

²³ Bone uses the phrase "general right" to apply to this category. Bone, *supra* note 18, at 237. Yeazell believes this phrase is empty formalism and that the essential requirement in equity was a goal based in common interest. YEAZELL, *MEDIEVAL GROUP LITIGATION*, *supra* note 18, at 181. Bone rejects Yeazell's interpretation as ignoring the rights-duties analysis of the decisions. Bone, *supra* note 18, at 269.

²⁴ Bone argues that such rights were impersonal, *i.e.*, independent of the personal wills of group members. Bone, *supra* note 18, at 238. But the impersonal/personal distinction is not established in the cases or commentaries and is not accepted by Yeazell. YEAZELL, *MEDIEVAL GROUP LITIGATION*, *supra* note 18, at 181. Trying to determine whether rights and duties of parishioners, merchant guild members, joint stock companies, crews of prize ships, and friendly societies have personal rights poses difficult and confusing questions not important to our analysis. What is important is that the rights of the class were identical, not just similar. Moreover, Bone's analysis that binding class actions only existed when rights to a class were determined and involved impersonal remedies is questionable. See Bone, *supra* note 18, at 238. See also *infra* notes 55-60 and accompanying text discussing *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), in which the Court bound the class because identical claims were being adjudicated, even though the interests of the class were deemed separate and distinct.

separate actions at law. Such actions involved a “multiplicity of suits,” which gave equity jurisdiction to resolve the claims in one group lawsuit.

The second broad category of accepted class actions involved adjudication of identical rights or duties and remedies among the members of the class in the initial stage, but the suit in later stages involved non-similar issues. Examples included:

(1) Suits by a privateer crew member to determine the crew’s full share of the prize vis-à-vis the ship owner and then to distribute the shares;²⁵

(2) Suits brought against voluntary unincorporated associations, such as joint stock companies or friendly societies, by association members to recover funds or property wrongfully appropriated and then to dissolve the association or provide an accounting and distribution;²⁶ and

(3) Suits by creditors against a debtor or the estate of a deceased debtor to declare assets as the property of creditors and then to distribute the funds to the creditors.²⁷

These class actions normally involved two stages. Stage one established the rights of the crew members, association members, or creditors against the ship owner, association manager, or debtor. In stage one, the rights and remedies of the class members were identical in that the goal was to obtain the maximum prize, fund, or assets from the defendant in an interlocutory decree. On the other hand, stage two involved a determination of individual rights and remedies between class members as the prize, fund, or assets were divided among the class. The first stage was appropriate for a class action. The second stage required notice and individual opportunity to litigate.

Equity courts justified jurisdiction in these two categories of class suits because legal remedies were inadequate and individual litigation was likely to generate a multiplicity of suits at law.²⁸ This “multiplicity standard” did not

²⁵ See *Good v. Blewitt*, 34 Eng. Rep. 542 (Ch. 1815); *Good v. Blewitt*, 33 Eng. Rep. 343 (Ch. 1807); *Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 98 (1838).

²⁶ See *Small v. Attwood*, 159 Eng. Rep. 1051 (Ex. 1832); *Hichens v. Congreve*, 38 Eng. Rep. 917 (Ch. 1828); *Lloyd v. Loaring*, 31 Eng. Rep. 1302 (Ch. 1802); see also *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1006–08 (Ch. 1809).

²⁷ See *Good*, 34 Eng. Rep. at 543 (analogizing to a creditor bill); *Leigh*, 28 Eng. Rep. at 201 (describing a creditor bill).

²⁸ *Bone*, *supra* note 18, at 236; see also *Ewelme Hosp. v. Andover*, 23 Eng. Rep. 460 (Ch. 1684); *How v. Tenants of Bromsgrove*, 23 Eng. Rep. 277 (Ch. 1681).

refer just to an overlapping of common issues or a similarity of interest in the general goals of the litigation; rather, the class cases that qualified for equity jurisdiction under the multiplicity standard involved identical legal rights and duties.²⁹

The representative suit served a key function in solving compulsory joinder problems. Representative actions frequently sought decrees that determined the rights of all class members—crews, voluntary association members, or creditors. A determination of the total amount of the prize, fund, or assets affected the rights of individual crew members, association members, or creditors, respectively, and such a determination required joinder of the entire class. Joinder might be impossible, however, because of the potential numbers of parties.³⁰ Moreover, if some parties were unavailable, the chancellor had to dismiss the action and deny all relief. The representative suit solved these problems, making litigation of multiple claims possible.

The “on behalf of” allegation established a formal connection between the lawsuit and absent parties, who were known as “quasi-parties.” The quasi-party status of absentees allowed the court to fashion a decree that took account of absentees’ rights and duties in the face of a technical rule that prevented equity courts from acting on the rights or duties of “strangers” to a suit.³¹ Quasi-parties also were not subject to the restrictive intervention rules applicable to strangers and were able to intervene in the suit and participate as parties if they wished.³²

Representative suits were available only when there was a “common interest” between the representatives and absent class members. This phrase in modern procedure is ambiguous, but, in courts of equity from 1500–1850, the term had a more precise meaning. Common interest denoted “formal

²⁹ Bone, *supra* note 18, at 237–38.

³⁰ Moreover, in chancery, the death of a party required the court to start over with resulting interminable delays. Thus, it was impractical to join a large number of parties. The problem was solved by the representative suit because the death of an absent class member would not affect the continuance of the suit.

³¹ CALVERT, *supra* note 20. “The established rule is, that . . . nothing under the great seal can issue, except *inter partes*,” subject to limited exceptions. *Id.* at *60. Moreover, “the rights of no man shall be decided in a court of justice, unless he himself be present.” *Id.* at *1.

³² See, e.g., *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1007 (Ch. 1809) (holding that absentees are quasi-parties who can be introduced into the litigation through a subsequent proceeding); see also CALVERT, *supra* note 20, at *58 (explaining that while a stranger to a lawsuit normally cannot participate in a suit without the parties’ consent, a member of a class on whose behalf the action is brought is a quasi-party, not a stranger, with the consequence that “his cause is in the course of decision, and he may at any time take an active part”).

relationships among pre-existing rights and duties . . . warranting a single remedy.”³³ The class members’ rights or duties had to be connected to the subject of the suit in exactly the same way.

The general right cases met the common interest requirement, but only the first stage of the second category of class actions satisfied this requirement. General right cases affecting tenants and parishioners, for example, satisfied the common interest requirement because each class member had identical rights and duties affected in the same way due to their occupancy of the same group territory.³⁴ On the other hand, in nongeneral right cases—privateer crew member, voluntary association, and creditor suits—there was a combination of common and individual claims. For example, the association suit to recover property wrongfully converted by the association involved a common interest in stage one: all association members had identical rights and sought to maximize the group’s total fund. However, regarding the distribution of the fund to association members, the rights were individual. There was no common interest (notwithstanding some common issues of fact or law), and individuals were given the right to participate. Class adjudication was not permitted for phase two.³⁵

The binding effect of representative suits in equity during this period was less clear.³⁶ There was common agreement that general right cases bound all class members whether or not they appeared as parties.³⁷ On the other hand, in

³³ Bone, *supra* note 18, at 247 (criticizing Yeazell’s assumption that common interest meant common goals or objectives).

³⁴ *Id.* at 249.

³⁵ It was not uncommon for courts to deny a class suit for lack of the requisite common interest in phase one. *See Long v. Yonge*, 57 Eng. Rep. 827, 833–34 (Ch. 1830) (holding that shareholders in a joint stock (insurance) company could not file a bill on behalf of themselves and others for the dissolution of a partnership unless “all the members, however numerous, . . . [were] parties to the suit”); *Leigh v. Thomas*, 28 Eng. Rep. 201, 201–02 (Ch. 1751) (sustaining a demurrer for failing to bring the suit on behalf of the whole crew when a bill was brought by two of a ship’s crew, appointed under an agreement signed by 64 of 80 crew members, to be agents for the rest on an accounting of prize money); *see also Evans v. Stokes*, 48 Eng. Rep. 215 (Ch. 1836) (holding that all those interested had to be parties to a suit for dissolution of a joint stock company because it could result in the cancellation of approximately 4,000 policies, potentially harming absent plaintiffs).

³⁶ *See Barker v. Walters*, 50 Eng. Rep. 36, 38–39 (Ch. 1844); *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1007 (Ch. 1809).

³⁷ In *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676), a parish was sued by a Vicar for prescription rights to a portion of ore from mines. “Four [p]ersons were named by the [m]iners to defend the [s]uit for them,” and the identity of claims between the representatives and the class was the single issue of the Vicar’s claim. *Id.* at 797. Although the miners allegedly “named” their representatives, Vermuden, a miner, later argued that

stage one, the binding effect of the privateer, association, and creditor suits was ambiguous. Stage one, concerning the common interest of the crew, association members, or creditors versus the ship owner, misappropriating officer, or debtor, resulted in an interlocutory decree subject to revision in chancery. Equity was to shape its decrees to protect the absent members,³⁸ and there was authority that the absentee could challenge an unfavorable decree.³⁹ In related cases, however, nonparticipating crew members were not permitted to attack the final decree's declaration of the total prize belonging to the crew because they had been given an opportunity to participate in the proportion

he should not have been bound by the action because he was not a party to it. *Id.* The court rejected Vermuden's argument stating, "If the Defendant should not be bound, Suits of this Nature, as in case of Inclosures, Suit against the Inhabitants for Suit to a Mill, and the like, would be infinite, and impossible to be ended." *Id.*; see also *Weale v. West-Middlesex Waterworks Co.*, 37 Eng. Rep. 412, 416 (Ch. 1820); *Adair v. New River Co.*, 32 Eng. Rep. 1153, 1159 (Ch. 1805); CALVERT, *supra* note 20, at *59-60 (noting that the effect of a general right decree on those persons represented "does not appear to have been specifically decided," but arguing that it ought to bind absentees in order to accomplish its purpose of settling rights); STORY, *supra* note 25, § 120 (stating that "in most, if not in all . . . [general right cases], the decree obtained upon such a bill will ordinarily be held binding upon all other persons standing in the same predicament").

³⁸ See *Good v. Blewitt*, 34 Eng. Rep. 542, 543 (Ch. 1815) (explaining that if the absentee's share was liquidated and known to the master, the court sometimes made provision for it in the final decree and kept the decree open so that the absentee might later claim his share without having to initiate an entirely new proceeding).

³⁹ See *Barker*, 50 Eng. Rep. at 38-39 (expressing the uncertainty about the effect of a judgment adverse to absentees in a voluntary association suit); *Good*, 34 Eng. Rep. at 543 (permitting creditors coming in before the master to challenge the decree); *Cockburn*, 33 Eng. Rep. at 1007-08.

In *Cockburn*, the court stated:

The Court must always be open to questions upon the carriage of the cause, applications for re-hearing, &c.; and I should upon principle find the means, if not supplied by precedent, . . . of giving a creditor, coming in after the institution of a suit, the opportunity of supporting his interest better than the Plaintiff could.

Id. at 1008 (citing *Gifford v. Hort*, 1 Sch. & Lef. 386, 409 (Ch. 1804)). The statement in *Cockburn* may be based in part on the nature of an interlocutory decree in equity. See also STORY, *supra* note 25, § 96 (stating that persons not directly made parties may come in under the decree and "take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing").

adjudication.⁴⁰ Stage two of the privateer, voluntary association, and creditor cases was not binding on absent class members.

The protection of absent members was supported during this era by the following:

(1) The representative and class claims had to involve identical rights and duties. Such identity meant that the self-interest of the representative would encourage competency in presentation and avoid conflict or collusion. In general, neither consent nor notice was required in fashioning a binding decree where there was the requisite identity of claims,⁴¹ but it was easy for absentees to enter the suit if they wished.⁴²

(2) The court in equity was specifically charged with the duty to shape the decree to protect absent members of the class. The identity requirement together with this equity maxim meant that the decree could not benefit the representative at the expense of the class.⁴³

C. *The American Precedent to 1938*

In the United States, the rights of the individual to notice giving opportunity to be heard were enshrined in the Due Process Clauses of the Fifth Amendment⁴⁴ (as against the federal government) and of the Fourteenth Amendment⁴⁵ (binding on state governments) during 1791 and 1868, respectively. The effect that these due process requirements had on the enforceability of class judgments was compounded by the problems of affording complete relief between courts of different states or between state and federal courts. Construction and application of the Full Faith and Credit

⁴⁰ For example, in *Good*, officers and crew of a privateer brought suit, according to the ship's articles (signed by the crew), against the owners for an account of captures and distribution of prize money. *Good*, 34 Eng. Rep. at 542. The chancellor issued a "decree directing an inquiry, [as to] who [was] the person entitled with the Plaintiff to the produce of [that] adventure, and in what shares and proportions, with advertisement for that purpose" *Id.* at 543.

⁴¹ Bone, *supra* note 18, at 260.

⁴² *Id.* at 250.

⁴³ See *Good v. Blewitt*, 34 Eng. Rep. 542, 542 (Ch. 1815); *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1008 (Ch. 1809); STORY, *supra* note 25, § 96 (John M. Gould ed., 1892).

⁴⁴ U.S. CONST. amend. V.

⁴⁵ U.S. CONST. amend. XIV, § 1.

Clause⁴⁶ of the Constitution and *res judicata* principles included therein were crucial in the enforcement of a class judgment against absent members of the class who had received no notice giving opportunity to appear in court. The class action concept as an exception to individual autonomy over litigation thus faced constitutional limitations.⁴⁷

However, several factors tended to favor the development of class procedure in the nineteenth century under the federal multistate system. It was decided that federal subject-matter jurisdiction based on diversity citizenship required only that the citizenship of the named representatives be diverse from the citizenship of the party opposing the class. Thus, diversity of citizenship was not affected by the citizenship of absent class members. Therefore, those seeking federal jurisdiction could choose representatives for the class who accomplished this result. Moreover, compulsory joinder problems involving jurisdiction over-the-person requirements, subject-matter jurisdiction, and venue rules, which made litigation for or against absent necessary or indispensable parties more difficult, were solved by representative lawsuits.

Justice Story, in his treatise on equity, attempted to state and simplify class action procedure.⁴⁸ Story categorized class suits developed from English precedent into three types:

- (1) Where the question is one of common or general interest and one or more sue or defend for the benefit of the whole;
- (2) Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole;
- (3) Where the parties are very numerous, and, though they have or may have separate and distinct interests, it is impracticable to bring them all before the court. This category also requires a common or general interest.⁴⁹

Story's categories failed to make clear distinctions and reflected more generalized description than analysis. Thus, instead of aiding the practitioner or the judge, Story simply compounded confusion. It is clear enough that category (2) was something different than (1) and (3), but (3) obviously overlapped (1)

⁴⁶ U.S. CONST. amend. IV, § 1.

⁴⁷ The preference for individual control is further reflected in the class action prerequisite that the parties be so numerous that it is impracticable to join them.

⁴⁸ STORY, *supra* note 25, §§ 97-99, 103, 107, 110-11, 116, 120.

⁴⁹ *Id.* §§ 97, 120; *see also* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853).

because numerosity and impractical joinder were prerequisites to all class categories. However, the main question is whether any of these categories were binding on absent members of the class. Story did not clearly resolve this issue.⁵⁰

Legislative reform during this period also did not clearly resolve whether class actions were binding on absent members. On the one hand, old Equity Rule 48, adopted in 1842, made class actions nonbinding. Old Rule 48 provided:

Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it.⁵¹

The Rule also provided that class suits were not binding on absentees, “[b]ut in such cases the decree shall be without prejudice to the rights and claims of the absent parties.”⁵² This sweeping limitation on the utility of class suits was contrary to English precedent, at least as to the general right cases. On the other hand, the Field Code, adopted in New York in 1848 and in California in 1850, contained no limitation or insight as to the binding effects of class judgments.⁵³ The Code formally adopted the class device as follows: “[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.”⁵⁴

The Supreme Court faced the issue of the binding nature of class suits in *Smith v. Swormstedt*.⁵⁵ This landmark decision has guided our modern

⁵⁰ Story failed to provide the necessary analysis and rationale for the different lines of cases that he cites. Compare STORY, *supra* note 25, § 96 (stating that class actions are binding) with STORY, *supra* note 25, § 126 (stating that some class actions may not be binding).

⁵¹ JAMES L. HOPKINS, *THE NEW FEDERAL EQUITY RULES* 104 (8th ed. 1933).

⁵² *Id.* at 105.

⁵³ See Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 5 (1988).

⁵⁴ CAL. CIV. PROC. CODE § 382 (West 1973).

⁵⁵ 57 U.S. (16 How.) 288, 301 (1853). The first class action in America was not *Smith*, but *West v. Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (No. 17,424). Justice Story, who wrote the opinion, explained in dictum the need for judicial efficiency in class suits, including giving relief to named parties, without prejudicing absentees. *Id.* at 723. Story

development of class action procedure. The Court charted its own ground, citing, but stepping around, Justice Story's treatise⁵⁶ and reaching back to the binding-by-representation characteristic of the English system.

The dispute in *Smith* arose between the northern and southern Methodist ministers over the distribution of their assets when the Methodist Church divided over the issue of slavery. A plaintiff class consisting of southern Methodist members sued a defendant class consisting of northern Methodist members for their proportion of the common property and funds held by the unified Methodist Church.⁵⁷

The Court categorized the interests of the members of both classes as being separate and distinct, yet both the plaintiff and the defendant classes had a "common interest" or a "common right."⁵⁸ A common interest or right was defined by reference to English precedent upholding, inter alia, tenants' suits against the lord of the manor to establish a right to a mill or to cut turf and suits brought by a parson against parishioners to establish rights to tithes.⁵⁹

The Court related the binding character of class actions to identity of claims with this comment:

For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and *the decree binds all of them the same as if all were before the court*. The legal and equitable rights and liabilities of all being before the court by representation, and especially *where the subject-matter of the suit is common to all*, there can be very little danger but that the interest of all will be properly protected and maintained.⁶⁰

The Court said no more about the identity of claims requirement, but the groundwork was laid for binding class actions. The key lies in an analysis of the last sentence of the aforementioned quotation. First, the legal and equitable rights and liabilities of all are before the court. Thus, class claims must be encompassed within the claims of the representatives. Second, the subject matter of the suit is common to all. Finally, the interests of the class must be properly protected and maintained. It is unclear whether this final requirement is just an effect of the first two requirements or a separate concern.

summarized English precedent and the general right, as described *supra* notes 25, 48-50 and accompanying text.

⁵⁶ STORY, *supra* note 25, §§ 97-99, 103, 107, 110-111, 116, 120.

⁵⁷ *Smith*, 57 U.S. at 307.

⁵⁸ *Id.* at 302-03.

⁵⁹ *Id.* at 302.

⁶⁰ *Id.* at 303 (emphasis added).

The Court upheld the class action as binding although the interests of the members of both classes were separate and distinct and no individual notice or opportunity to be heard was given to absent class members.⁶¹ This was a substantial break from old Equity Rule 48 and a return to the binding-by-representation characteristic of the English general right cases.⁶²

⁶¹ *Id.* at 309.

⁶² The identity of claims requirement is further illustrated in a case decided 24 years before *Smith*, *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566 (1829), which allowed adjudication of identical claims regarding the use of church premises. In *Beatty*, a group of plaintiffs brought suit on behalf of a church group to enjoin the retaking of property by legatees. *Id.* at 579. The issue was whether a church graveyard was properly used for church purposes as required in the bequest of the original donor. *Id.* at 579–81. The Court recognized that this was the type of case where “certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society for purposes common to all, and beneficial to all.” *Id.* at 585. Thus, identity of claims and remedy was satisfied by membership to a voluntary association.

However, one year after *Smith*, in *Ayres v. Carver*, 58 U.S. (17 How.) 591 (1854), the Court approached a defendant class warily. The complaint was filed against Joseph W. Matthews and “some two hundred others,” residents of various states, seeking clarification of property rights established by treaty with the Chickasaw Indians. *Id.* at 592. The case was dismissed because the lower court’s decision on a cross bill was not an appealable final judgment. *Id.* at 595. In dictum, however, the Court said, “[I]t is difficult to see any interest or estate in common among these several defendants, that would authorize the rights of the absent parties to be represented in the litigation by those upon whom process has been served, and who have appeared to defend the suit.” *Id.* at 594. In other words, binding absent defendants would require some kind of estate in common in addition to identity of claims.

Identity of claims was expanded upon in *In re Englehard*, 231 U.S. 646 (1913), which held that a city acted as a proper representative defendant for all citizens interested in a suit by a telephone company to redistribute excess charges. Because the single legal issue automatically enured to the benefit or adversely affected all absent and named, the identity of claims requirement was satisfied. *Id.* at 651.

The Court cited *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, 134 U.S. 418, 460 (1890), for the proposition that elected citizen representatives may stand for the absent citizens in a suit against the state. *In re Englehard*, 231 U.S. at 651. *Chicago, Milwaukee*, involved a railroad challenging state milk rates under the Due Process Clause, and it confirmed the use of a representative suit for common rights or interests, *i.e.*, identity of claims and remedies. *Chicago, Milwaukee*, 134 U.S. at 453. This class of representative suits is further supported by *Winton v. Amos*, 255 U.S. 373 (1920), which bound absent members in a class of Indian tribes that was represented by a congressionally appointed group of class members.

The Court officially abandoned old Equity Rule 48 in 1912 and adopted Equity Rule 38.⁶³ This new Rule excluded the provision that class actions were nonbinding.⁶⁴ This exclusion was in line with *Smith*⁶⁵ and English precedent. As one commentator stated:

Rule 38 was promulgated on the recommendation of the Bar Committee of the Circuit Court of Appeals of the Second Circuit; the committee advising the omission of the last sentence of former Rule 48, "for the reason that in every true 'class suit' the decree is necessarily binding upon all parties included in the decree."⁶⁶

During this period, circuit courts were also deciding the issue of the binding effect of the class suit. Prior to the enactment of Equity Rule 38, the binding effect of class actions was applied to union members.⁶⁷ Following the enactment of Equity Rule 38, a defendant class involving claimants to an estate was also upheld as binding.⁶⁸

⁶³ See HOPKINS, *supra* note 51, at 145.

⁶⁴ *Id.* at 238-39; *cf. id.* at 104-05.

⁶⁵ *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853).

⁶⁶ HOPKINS, *supra* note 51, at 240 (citing *Coann v. Atlanta Cotton Factory Co.*, 14 F. 4 (C.C.N.D. Ga. 1882) and *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions*, 90 F. 598 (C.C.N.D. Ohio 1898)).

⁶⁷ In *American Steel & Wire Co.*, 90 F. at 598, a defendant class suit against the named elected representatives of a union and various members was allowed to bind absent members of the union. The American Wire Company sought an injunction to restrain union members from trespassing on the strike locked-out factory. *Id.* at 603. The complaint only named the union representatives, but the court extended the injunction to a class of unnamed union members. *Id.* at 605. The court stated that

it is one of the features of an interlocutory injunction that it reaches all who are parties, whether they have been served with process of subpoena or not, whether they have appeared or not, whether they have answered or not; and it binds all who have notice of it, whether they are parties or not.

Id. at 604. Compare *American Steel & Wire Co.* with *Hill v. Eagle Glass & Mfg. Co.*, 219 F. 719 (4th Cir. 1915), *aff'd in part, rev'd in part*, 245 U.S. 275 (1917), which held that representatives would not adequately serve to represent union members to litigate issues of personal liability in a tort action because the common interest or identity of claims was lacking. *Hill*, 219 F. at 720-21.

⁶⁸ In *McClelland v. Rose*, 247 F. 721 (5th Cir. 1918), claimants to the estate of Peter McClelland, Sr., not named in the state court action that distributed rights under the will, were held to have had their rights adjudicated in a prior suit. The circuit court found that the original action was binding because the subject matter was common and the named

The Court readdressed the binding effect of class judgments in *Supreme Tribe of Ben-Hur v. Cauble*.⁶⁹ In *Cauble*, some 524 representatives from states other than Indiana filed a class action in federal court against an Indiana fraternal organization, the Supreme Tribe, contending that its reorganization was not valid.⁷⁰ The Court upheld the class suit as involving “common” and “joint” interests and found for the fraternal organization. Later, various Indiana members of the Supreme Tribe filed in Indiana state court against the reorganization.⁷¹ The claims were identical to those adjudicated in the federal court action.⁷² The Supreme Tribe filed an ancillary bill in federal court seeking to enjoin the maintenance of the state action, which would relitigate the claims.⁷³

representatives adequately represented the class. *Id.* at 724–25. The basis for this binding decree was a line of cases beginning with *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853). *McClelland*, 247 F. at 724.

The original action involved a defendant class and the court found that relief was sought

not only against those who are brought before the court as defendants, but against others similarly related to the subject of dispute, it is not necessary to aver in terms that those who are made defendants are sued as representatives of the class of which they are shown to be members, especially when it is disclosed that those who defend contest the plaintiff’s claim by setting up the *claim that the subject of the suit belongs in common to an entire class* which they admit does or may include others besides themselves.

Id. (emphasis added). The court was faced with a single res, claim, and defense that was common to the defendant class. The court stated the following:

[This] shows plainly that in resisting the claim set up by the plaintiff they were not acting for themselves alone, but were making a defense which inured equally to the benefit of other unknown parties . . . [who had] inferred from the record that the conclusion was reached that those of the testator’s collateral heirs who were brought before the court fairly represented the right asserted by them, which was one belonging in common to all of the class of which they were members, as well those who were not as those who were before the court.

Id. at 725–26. The prior class adjudication was, thus, declared binding.

⁶⁹ 255 U.S. 356 (1921).

⁷⁰ *Id.* at 360–61.

⁷¹ *Id.* at 361–62.

⁷² *Id.* at 362.

⁷³ *Id.* at 357.

The Supreme Court, citing to *Smith v. Swormsted*⁷⁴ and English precedent, emphasized the binding nature of a class judgment and the adequate protection that follows from the identity of claims between the representative and the class. The Court stated, "The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."⁷⁵

The Court granted the injunction enforcing the class judgment and declared the following:

If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree.⁷⁶

Thus, prior to 1938, class actions involving a "common or general interest" were permitted in equity.

The phrase "common or general interest" required an identity of claims between the representative and absent members of the class. Such identity existed if all class claims were encompassed within the claims of the

⁷⁴ 57 U.S. (16 How.) 288 (1853).

⁷⁵ *Cable*, 255 U.S. at 363 (1921) (quoting *Smith*, 57 U.S. at 303).

⁷⁶ *Id.* at 367. A decision restating the binding and conclusive effect of class judgments is *Gramling v. Maxwell*, 52 F.2d 256 (D.N.C. 1931). In *Gramling*, a single taxpayer sued the state on behalf of all taxpayers affected by a state shipping statute allegedly violative of the Commerce Clause. *Id.* at 257-58. The court stated the following:

It is a class suit instituted in behalf of a large number of peach growers affected by the statute; and we think that it may be maintained in equity for the purpose of avoiding the multiplicity of suits which would otherwise result. . . . [S]ince the adoption of the 38th Equity Rule (28 [U.S.C.A.] § 723), the right to maintain such a suit cannot be denied. . . . [T]here can be no question [that maintaining this class suit] is speedier, more efficacious, and more satisfactory for all parties concerned than the institution of a hundred or more actions at law

Id. at 260. Ultimately, the court found that the identity of claims was sufficient to bind all members of the group based on the litigation by the named parties. *Id.* at 261, 263.

representatives, the subject matter of the suit was common to all, and the interests of the class were properly protected and maintained. Identity of claims did not require that all class members seek identical damages. When identity of liability claims existed, the absent members were fairly represented, and the class judgment was binding. As shown by the next section, this identity of claims requirement was given constitutional due process status in 1940.

III. DUE PROCESS APPLIED TO CLASS ACTIONS

In 1940, the Supreme Court made the identity of claims safeguard for absent class members part of due process protection through its decision in *Hansberry v. Lee*.⁷⁷ In *Hansberry*, the Court confronted an agreement among land owners not to sell to or to permit occupancy of their land by African Americans in areas of Chicago. The agreement was to go into effect upon written approval by ninety-five percent of the owners within the specified areas.⁷⁸ A class action was brought in Illinois state court to enforce the agreement against four nonapproving individuals.⁷⁹ The parties stipulated that ninety-five percent or more of the owners had signed the agreement.⁸⁰ The Illinois court upheld the validity of the covenant and held that this judgment was binding upon all the land owners within the specified areas.

In a subsequent collateral attack on the Illinois judgment, *Hansberry*, who was an absent member of the original class, challenged the covenant.⁸¹ *Hansberry* claimed that he was not adequately represented and, thus, not bound by the earlier class judgment and stipulation therein.

The Supreme Court held that a denial of due process may be raised by an absent class member in a collateral attack on a class judgment;⁸² however, such an attack is permitted "only in those cases where it cannot be said that the procedure adopted [by the court issuing the first judgment], fairly insures the protection of the interests of absent parties who are to be bound by it."⁸³ The Court found that the Illinois judgment denied *Hansberry* his due process rights because *Hansberry* was not in the same class as or adequately represented by those who defended the covenant.⁸⁴ *Hansberry*, who opposed the enforcement

⁷⁷ 311 U.S. 32 (1940).

⁷⁸ *Id.* at 38.

⁷⁹ *Burke v. Kleiman*, 277 Ill. App. 519 (1934).

⁸⁰ It was subsequently developed that this stipulation was erroneous but not fraudulent or collusive. *Hansberry*, 311 U.S. at 39.

⁸¹ *Id.* at 32.

⁸² *Id.* at 40.

⁸³ *Id.* at 42 (quoting *Chicago, B. & O. R.R. v. Chicago*, 166 U.S. 226, 235 (1897)).

⁸⁴ *Id.* at 44.

of the covenant, could not have had an identity of claims and remedy with those who favored the covenant's enforcement. The class judgment, therefore, was void and subject to collateral attack.

The Court explained the due process requirement by a two-step analysis. First, as a general proposition, a judgment has binding force only when the parties had notice and opportunity to be heard. The Court stated the following:

[W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been *afforded such notice and opportunity to be heard as are requisite to the due process* which the Constitution prescribes.⁸⁵

Second, there is a general exception to the requirement of notice and opportunity to be heard. A judgment in a class suit, "to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it,"⁸⁶ provided the following conditions are met:

(1) The class suit must involve a substantial number of people so that their joinder as "parties in conformity to the usual rules of procedure is impracticable;"⁸⁷

(2) "[T]he interests of those not joined [must be] of *the same class* as the interests of those who are" joined;⁸⁸ and

(3) Those joined must *fairly represent* the class "in the prosecution of the litigation of the *issues in which all have a common interest . . .*"⁸⁹

By this language, the identity of claims principle became essential to due process approval. Various cases were cited by the Court to further clarify the meaning of the phrases "same class," "fair representation," and "common interest."⁹⁰ Moreover, the cases selected by the Court to illustrate when there

⁸⁵ *Id.* at 40 (emphasis added) (citing *Western Life Indem. Co. v. Rupp*, 235 U.S. 261, 273 (1914)).

⁸⁶ *Id.* at 41.

⁸⁷ *Id.*

⁸⁸ *Id.* (emphasis added).

⁸⁹ *Id.* (emphasis added).

⁹⁰ In *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), the original class action was brought by 524 beneficiaries of a fraternal benefit association. The legal issue

is a lack of identity of claims are instructive in establishing this same requirement.⁹¹

was the validity of a reorganization plan adopted by defendant's governing body. *Id.* at 360. The Court stressed that this issue involved a common and joint interest and held that the adjudication was entitled to full faith and credit. *Id.* at 366-67.

In *Hartford Life Ins. Co. v. Barker*, 245 U.S. 146 (1917), a class action was brought by certificate holders against an insurance company involving the single issue of the validity of a mortuary fund. *Id.* at 148. The claim of the class and the representatives was identical. When an absent member of the class later sued on the same issue, the Court held that the prior class judgment was entitled to full faith and credit effect over the later legal attempt. *Id.* at 151.

In *Royal Arcanum v. Green*, 237 U.S. 531 (1915), sixteen plaintiffs filed suit as a class against their fraternal society. *Id.* at 536. The single issue was whether the society was entitled to increase its rates against its members. *Id.* at 537. Because the identity of claims between the representative and the class made the adjudication binding, when an absent member of the class attempted to later raise the same issue, that member was foreclosed by res judicata.

For additional discussion of key terms embodied in the identity of claims principle, see *supra* notes 55-60 and accompanying text.

⁹¹ In *Christopher v. Brusselback*, 302 U.S. 500 (1938), creditors brought suit against a corporation and its shareholders as a class. The purpose of the suit was to force statutory liability on the shareholders. *Id.* at 501. The shareholders had not, under the statute in question, agreed to representation by the corporation on any issues. Further, there was a lack of adequate representation because the claims and remedies of the corporation, as a purported representative, were not identical to the interest of the members of the shareholders class. *Id.* at 504.

In *McQuillen v. National Cash Register Co.*, 112 F.2d 877 (4th Cir. 1940), a shareholder sued a corporation to cancel "A" stock issued in lieu of back dividends. *Id.* at 882. Because of their divergent interests, the court held that the "A" shareholders were not adequately represented by the corporation on the issue of the validity of the stock. *Id.*

In *Taggart v. Bremner*, 236 F. 544 (7th Cir. 1916), a patent owner sued a defendant class of several hundred dentists charging them with infringement. *Id.* at 544. The court upheld the discretion of the trial court to dismiss and proceed against only a single named defendant because separate issues would be involved as to each of the dentists. *Id.* at 547.

In *Weidenfeld v. Northern Pacific Railroad*, 129 F. 305 (8th Cir. 1904), a shareholder sued a corporation alleging a conflict between the corporation and its principal shareholder. *Id.* at 306. The court held that the corporation could not, under those circumstances, act as representative for the principal shareholder. *Id.* at 311-12.

In *Terry v. Bank of Cape Fear*, 20 F. 777 (C.C.W.D.N.C. 1884), a class of creditors brought action against a class of shareholders of an insolvent corporation. *Id.* at 778. The shareholder class included some absent parties who had an apparent valid defense of statute of limitations. *Id.* at 779. The court held that the special category of shareholders were not part of the same class because there were uncommon issues among class members. *Id.* at 782-83.

Of special interest among the cases cited to illustrate a lack of identity of claims and remedies is *Coe v. Armour Fertilizer Works*,⁹² in which creditors sued a corporation pursuant to a statute to force collection from shareholders who had unpaid subscriptions.⁹³ The Court held that the corporation *was* an adequate representative of the shareholders on the common issue of the existence and amount of the debt claimed by the creditors. The Court held that the corporation *was not* an adequate representative of the shareholders on other issues, such as the special defenses of stockholders on their particular subscription agreements.⁹⁴ Due to the inadequate representation, the earlier adjudication directed against the shareholders on the uncommon issues was deemed a denial of due process.

The Court made it clear in *Hansberry v. Lee*⁹⁵ that this due process limitation applied not only to federal courts but, according to the Fourteenth Amendment, to state courts.⁹⁶ The following is the Court's reiteration of the requirements of sameness of class, adequate representation, and common interest for state courts:

Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the *same class* as those absent and that the litigation is so conducted as to insure the full and fair consideration of the *common issue*.⁹⁷

The language of *Hansberry* does not establish the due process standard as a balancing test of the same class, fair representation, and common interest requirements. On the contrary, the due process principle requiring representatives to satisfy these three requirements is declared in absolute and certain terminology.

⁹² 237 U.S. 413 (1915).

⁹³ *Id.* at 416.

⁹⁴ *Id.* at 423.

⁹⁵ 311 U.S. 32 (1940).

⁹⁶ *Id.* at 42.

⁹⁷ *Id.* at 43 (emphasis added).

IV. ORIGINAL FEDERAL RULE OF CIVIL PROCEDURE 23

According to the notes of the Advisory Committee on the adoption of the Federal Rules of Civil Procedure in 1938, Rule 23 “adopts the test of Equity Rule 38, but defines what constitutes a ‘common or general interest.’”⁹⁸ Hence, no novel or marked departure from prior law was intended.⁹⁹ Rule 23(a), as adopted in 1938, provided as follows:

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, *when the character of the right* sought to be enforced for or against the class is

- (1) *joint, or common*, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
- (2) *several*, and the object of the action is the adjudication of claims which do or may affect *specific property* involved in the action; or
- (3) *several*, and there is a common question of law or fact affecting the several rights and a common relief is sought.¹⁰⁰

In his treatise on federal practice, Professor Moore described the three subsections of Rule 23(a) as setting forth three previously recognized types of class actions, which he described by the terms “true,” “hybrid,” and “spurious.”¹⁰¹ In the true class action, the rights of the class were “joint or common.” There was but a single claim for relief that accrued to or against a multitude of parties.¹⁰² The true class requirement of joint or common rights was more restrictive than Equity Rule 38’s requirement of common or general interest. The earlier equity rule permitted class actions when there was not a joint or common right held by members of the class. For example, in *Smith v. Swormstedt*,¹⁰³ the interests of the Methodist ministers were described as

⁹⁸ See 3B JAMES WM. MOORE & JOHN E. KENNEDY, MOORE’S FEDERAL PRACTICE ¶ 23.01[2] (2d ed. 1985) (quoting FED. R. CIV. P. 23 advisory committee’s note (1937)).

⁹⁹ See James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937).

¹⁰⁰ MOORE & KENNEDY, *supra* note 98, ¶ 23.01[1] (emphasis added).

¹⁰¹ *Id.* ¶ 23.01[8].

¹⁰² See *Pentland v. Dravo Corp.*, 152 F.2d 851, 852–53 (3d Cir. 1945); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 148 F.2d 403, 404 (4th Cir. 1945); *Knapp v. Bankers Sec. Corp.*, 17 F.R.D. 245, 247 (E.D. Pa. 1954), *aff’d*, 230 F.2d 717 (3d Cir. 1956); *Giesecke v. Denver Tramway Corp.*, 81 F. Supp. 957, 961 (D. Del. 1949).

¹⁰³ 57 U.S. (16 How.) 288 (1853).

several and distinct.¹⁰⁴ Moreover, suits by taxpayers, members of unincorporated associations, and joint stock companies, freely permitted in class action precedents, did not involve joint or common rights as those terms were understood at common law.¹⁰⁵ By narrowing the application of Rule 23(a)(1) to classes having joint or common rights, protection for the absent members was significantly enhanced, and historic identity of claims was clearly satisfied.

When a true class action was presented, the judgment, whether adverse or favorable, was binding on all members of the class. This binding effect applied even if class members did not join in the prosecution of the action. Also, the limits of a defendant's liability were determined by the initial judgment.¹⁰⁶

In the hybrid class action, the rights of the members of the class were several rather than joint or common. A hybrid suit was brought to establish the class right to particular property.¹⁰⁷ The first stage of the suit focused on the class's right to specific property; therefore, identity of claims was assured. In stage two, when the class claimants competed against each other for distribution of the property, identity of claims and remedy was absent and notice to class members was customarily given.¹⁰⁸

The judgment, whether adverse or favorable, was conclusive on the absent members of the class regarding their rights in the res. The limit of a defendant's liability to the class was determined in the initial litigation.¹⁰⁹

The spurious class action was recognized by the majority of courts and commentators merely as a form of permissive joinder. The rights of class members were several, each party necessarily suing upon his own claim for relief. Professor Moore stated this proposition as follows:

The spurious class suit is a permissive joinder device There is no jural relationship between the members of the class; . . . they have taken no steps to

¹⁰⁴ *Id.* at 302.

¹⁰⁵ Original Rule 23 was drafted as part of the compulsory joinder provision and reflected the meaning of joint and common rights as used in compulsory joinder law during the nineteenth and early twentieth centuries.

¹⁰⁶ See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Lowry v. International Bhd. of Boilermakers*, 259 F.2d 568 (5th Cir. 1958); *Stella v. Kaiser*, 218 F.2d 64 (2d Cir. 1954); *System Fed'n No. 91 v. Reed*, 180 F.2d 991 (6th Cir. 1950).

¹⁰⁷ See *Dickinson v. Burnham*, 197 F.2d 973, 980 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); see also MOORE & KENNEDY, *supra* note 98, ¶ 23.01[8].

¹⁰⁸ The Committee refused to describe the res judicata effect of the rule, but Moore specified the consequences in his treatise, which was accepted as authoritative. MOORE & KENNEDY, *supra* note 98, ¶ 23.01[8].

¹⁰⁹ See generally James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction & Effect of Judgment*, 32 ILL. L. REV. 555 (1938).

create legal relationships among themselves. They are not fellow travellers by agreement. The right or liability of each is distinct. The class is formed solely by the presence of a common question of law or fact.¹¹⁰

The spurious class action facilitated joinder and intervention. Numerous cases honored the proposition that original Rule 23(a)(3) authorized federal district courts to require that only the citizenship of the named representatives be considered in meeting federal diversity rules.¹¹¹ Unlike the true and hybrid class actions, it was well established that a judgment in a spurious class action did not bind class members who were not named parties or who did not formally intervene in the action.¹¹² Therefore, due process for unnamed

¹¹⁰ *Id.*

¹¹¹ See, e.g., *Amen v. Black*, 234 F.2d 12, 16 (10th Cir.), *cert. granted*, 352 U.S. 888 (1956), *remanded*, 355 U.S. 600 (1958); *Dickinson v. Burnham*, 197 F.2d 973, 980 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *Oppenheimer v. F.J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944); *Sperry Prods. Inc. v. Association of Am. R.R.*, 132 F.2d 408, 410-12 (2d Cir. 1942), *cert. denied*, 319 U.S. 744 (1943); *Zelley v. Muehleck*, 10 F.R.D. 62, 63 (E.D. Pa. 1950); *Shipley v. Pittsburgh & Lake Erie R.R.*, 7 F.R.D. 33, 34 (W.D. Pa. 1947); *Hunter v. Southern Indem. Underwriters, Inc.*, 47 F. Supp. 242, 243 (E.D. Ky. 1942).

¹¹² See *Martinez v. Maverick County Water Control & Improvement Dist. No. 1*, 219 F.2d 666, 672 (5th Cir. 1955) (stating that “[i]n a spurious class action the decree does not bind the class, but binds only those actually before the court”); *Dickinson v. Burnham*, 197 F.2d 973, 978-80 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737, 742 (7th Cir.), *cert. denied*, 344 U.S. 820 (1952); *Schatte v. International Alliance of Theatrical Stage Employees*, 183 F.2d 685, 687 (9th Cir. 1950); *California Apparel Creators v. Wieder of Cal., Inc.*, 162 F.2d 893, 896-97 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947); *Oppenheimer v. F.J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944); *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101, 105 (8th Cir. 1942) (citing with approval Judge Clark’s statement before the Institute on Federal Rules of Civil Procedure held in Washington, D.C. in 1938 that “[t]he first two [types of class suits under FED. R. CIV. P. 23] are really the proper cases of class suits, where the suing by the representative really should be binding and *res adjudicata* on those who are represented” (emphasis added)); *Canuel v. Oskoian*, 23 F.R.D. 307, 311 (D.R.I. 1959) (stating that “it is beyond dispute that ‘the spurious class suit is a permissive joinder device’”); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466, 482 (S.D. Cal. 1957) (stating that “[u]ltimately, the ‘spurious’ class action, so-called, is *nothing more than permissive joinder*”); *Bascom Laundry Corp. v. Telecoin Corp.*, 9 F.R.D. 677, 678 (S.D.N.Y. 1950) (noting that all the parties and the court recognized that the plaintiffs’ second claim was intended to be a spurious class action), *cert. denied*, 345 U.S. 994 (1953); *Hunter v. Southern Indem. Underwriters, Inc.*, 47 F. Supp. 242, 243 (E.D. Ky. 1942) (stating that a spurious class action is “merely a ‘joinder device’”); see also 2 WILLIAM W. BARRON &

spurious class members was usually not an issue. As a consequence of this nonbinding aspect of spurious class suits, the authorities were in conflict as to whether unnamed members of a class could benefit from the class judgment through post judgment intervention; but these authorities reaffirmed that such unnamed members did not bear the burden of an unfavorable adjudication.¹¹³

Criticism of original Rule 23 commenced soon after its enactment. In a widely cited article by Kalven and Rosenfield,¹¹⁴ the authors argued that the class device provided social and economic benefits and basic justice to individuals who otherwise had little chance for legal redress.¹¹⁵ The authors concluded that the categories of original Rule 23, which limited binding class judgments to cases involving either joint or common rights or several rights in a particular property or fund, unduly restricted the use of the class action device.¹¹⁶ Moreover, Professor Chafee urged dropping the true, hybrid, and spurious classifications and returning to the broader common or general interest requirement as described in Equity Rule 38.¹¹⁷ As his commentaries suggest, if classification does not carry the user forward to rational thought, what good are the categories? This criticism of original Rule 23 was acknowledged by the Advisory Committee, which adopted amended Rule 23 in 1966, expanding the utility of the class device by adopting broader categories.¹¹⁸

Most important, original Rule 23 did not directly address procedures to ensure fairness. Other than a general requirement that the representative must guarantee adequate representation of all, there was no provision for certification or decertification processes, definition of the class as to members and issues,

HON. ALEXANDER HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 572 (1961); 6 *CYCLOPEDIA OF FEDERAL PROCEDURE* § 23.09 (3d ed. 1966).

¹¹³ See *Bascom Launder Corp. v. Telecoin Corp.*, 204 F.2d 331, 336 (2d Cir.), *cert. denied*, 345 U.S. 994 (1953); *McGrath v. Tadayasu Abo*, 186 F.2d 766, 770 (9th Cir.), *cert. denied*, 342 U.S. 832 (1951); see also *York v. Guaranty Trust Co.*, 143 F.2d 503, 528-29 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

¹¹⁴ Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

¹¹⁵ *Id.* at 691-94.

¹¹⁶ *Id.* at 695-701.

¹¹⁷ CHAFEE, *supra* note 20. Chafee carefully traced the steps from the Bill of Peace to representative suits to class actions and the development of Equity Rules 38 and 48.

¹¹⁸ See Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 931 (1958) (noting twenty years of confusing experience in the federal courts attempting to deal with the true, hybrid, and spurious categories; confusion between joint, common, or several rights and the somewhat absurd use of the word "spurious" are all noted); Note, *Federal Class Actions, a Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 822 (1946) (stressing the confusion in the cases applying the true, hybrid, and spurious categories of the original rule).

guideline on proper notice, or establishment of rights of parties opposing the class. These issues were not addressed until the adoption of amended Rule 23.

However, in one aspect, the original Rule gave greater protection than the amended Rule. This safeguard was embodied in the judicial interpretation of the original Rule that limited binding class judgments to true and hybrid actions. Thus, a judgment was binding on absent class members only if the rights asserted were joint or common, or rights in the same property or fund. This ensured that historic due process, requiring an identity of claims between the representatives and the class, was met.

V. AMENDED RULE 23 AND ADEQUACY OF REPRESENTATION

The language and structure of amended Rule 23 weakened the due process and fairness protection for absent class members. Adequacy of representation was undercut by the adoption of numerous phrases having amorphous and elastic meaning. Moreover, the categories and structure of the Rule, as well as the alternative notice requirement enabling appearance or opt out, undercut the adequacy of representation standards.

A. *The Language of Amended Rule 23 and Adequacy of Representation*

Generally, adequacy of representation has four aspects. First, the named representatives and counsel must assert the claims of the absent members. Second, the named representatives must have an identity with the claims of the absent class members. Third, the named representatives and counsel must be competent to present the issues. This includes an analysis of motivation, willingness, financial ability, legal skills, reputation, and ethics of the representatives and counsel. Fourth, there can be no conflict of interest between the named representatives, their counsel, and the absent class members. This "no conflict" requirement includes conflicts arising from choice of claims or remedies. Although a conflict may also arise by reason of collusion, bribery, or other relationship, this aspect of the no conflict requirement will not be discussed herein.¹¹⁹

Amended Federal Rule 23(a) establishes four elements as a prerequisite to all categories of class actions.¹²⁰ First, the class must be so large that it is

¹¹⁹ 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1768 (2d ed. 1972).

¹²⁰ Section 23(a) of the Federal Rules of Civil Procedure states the following:

impracticable to join the members in court.¹²¹ This factor reaffirms the desirability of individual litigant autonomy. Only if joinder is impracticable are class suits authorized notwithstanding the judicial efficiency of a representative suit in smaller actions. Second, there must be one or more questions of law or fact common to the class. Third, the claims or defenses of the representatives must be typical of the class. Finally, the representatives must fairly and adequately represent the class.¹²²

B. *The Impact of Amended Rule 23 on Identity of Claims from 1966 to General Telephone*¹²³

From 1966 to 1982, because of confusion caused by amended Rule 23, the overwhelming majority of federal courts ignored historic identity of claims and adopted legal standards for class certification that conflicted with traditional due process concepts. Although these legal standards were overturned by *General Telephone*,¹²⁴ the misleading language of this period is still cited by various courts. Each of the key phrases of the amended Rule cause some confusion.

1. *Commonality*

Rule 23(a) requires that "there are questions of law or fact common to the class."¹²⁵ The Rule refers to questions, not issues or claims, and does not

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

¹²¹ This provision conflicts with the requirement that a (b)(3) class must receive notice giving the right to make an appearance through counsel. FED. R. CIV. P. 23(c)(2). If (b)(3) class members receive notice and do appear in large numbers, their appearance may make maintenance of the suit difficult, if not impractical.

¹²² FED. R. CIV. P. 23.

¹²³ *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

¹²⁴ *Id.*

¹²⁵ FED. R. CIV. P. 23(a)(2).

require that all or even a substantial number of questions be common to the class.¹²⁶

The plural language suggests that there must be more than one question in common; however, in practice, only one common question of law or fact will suffice.¹²⁷ So long as any common question links the representative and the

¹²⁶ However, in deciding whether to certify as a (b)(3) category, a court must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" FED. R. CIV. P. 23(b)(3).

¹²⁷ In *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980), 29 plaintiffs engaged in various facets of the commercial seafood industry sued Allied for discharging toxic effluence into the James River and Chesapeake Bay. *Id.* at 103. The plaintiffs sought certification on behalf of all residents of Virginia and Maryland whose livelihood or income was derived from catching, buying, selling, or processing seafood from the James River, Chesapeake Bay, or their tributaries. *Id.* at 104. The court found commonality since the standard requires only that there be some questions of law and fact in common and does not require a coincidence of legal claims. *Id.* at 105.

In *Edmondson v. Simon*, 86 F.R.D. 375 (N.D. Ill. 1980), a single plaintiff, a black woman, sued for sex and racial discrimination against the Chicago district office of the Internal Revenue Service. *Id.* at 380. Commonality was satisfied by a single issue common to all members of the class and across-the-board discrimination charges.

In *Rental Car, Inc. v. Westinghouse Electric Corp.*, 496 F. Supp. 373 (D. Mass. 1980), an action was brought on behalf of all Econo-Car dealers throughout the United States, including 178 car dealers and 122 past franchisees. *Id.* at 376. The court carefully analyzed the Sherman Act, the Clayton Act, and state law breach of fiduciary duty claims in order to determine commonality, typicality, and adequacy of representation. The court found commonality as to the plaintiffs' allegations that the franchisees were wrongfully precluded by the franchise agreement from purchasing automobile insurance from anyone other than the franchisor and as to an alleged fleet purchase price fixing conspiracy. *Id.* at 377-82.

In *Duncan v. Tennessee*, 84 F.R.D. 21 (M.D. Tenn. 1979), an action by a black employee alleging employment discrimination against the Tennessee Department of General Services was certified. The complaint of the named plaintiff related to the defendant's promotion practices, but the class action certification encompassed promotions, pay raises, equal working conditions, and the failure to hire black applicants. *Id.* at 27, 37.

In *Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655 (E.D. Pa. 1979), three black individuals sued for racial discrimination on behalf of (1) all past and present, professional and semiprofessional black salaried employees of Westinghouse and (2) all past, present, and future black applicants for professional and semiprofessional positions. *Id.* at 656. They also sought to represent the same groups in multiple plants of Westinghouse. *Id.* at 659. These class claims spanned some fifteen different categories of allegedly discriminatory acts, but the plaintiffs were complaining only of salary, promotion, and access to overtime pay. The court found commonality. *Id.*

In *Payton v. Abbott Labs.*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983), a class of women in Massachusetts who were exposed to DES by various

class, the standard is met even though there are substantial divergent questions.¹²⁸ As shown by the cases, commonality did not require identity of claims. So easily is the requirement satisfied that it is often conceded or ignored.¹²⁹

As thus phrased and applied, the commonality requirement provides little or no protection for absent members of the class. Neither identity of issues nor

manufacturers and who had yet to contract uterine or vaginal cancer was certified. *Payton*, 83 F.R.D. at 386. The legal issues resolved by the class suit included the right in Massachusetts to an action for mental anguish under similar circumstances, whether increased risk of cancer was a compensable injury, whether a cause of action for injury to the fetus existed, whether strict liability was appropriate, and whether a private right of action existed under the Federal Food, Drug and Cosmetic Act. *Id.* Although plaintiffs sought to certify a class including states other than Massachusetts, the court limited certification to Massachusetts because of multiple choice of law problems that undercut commonality. *Id.* But see *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656 (N.D. Cal. 1976) (action brought on behalf of all Vietnamese children who had not been legally released to the United States for adoption and whose families wanted their return; class certification was denied because numerosity and commonality were not clear because each Vietnamese child "bought" during the orphan air lift had a unique set of facts).

¹²⁸ In *International Molders' & Allied Workers' Local 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983), a class of plaintiffs sued the Immigration and Naturalization Service and the United States Border Patrol for alleged unconstitutional raids on various work sites. *Id.* at 460. The plaintiff representatives sought only declaratory and injunctive relief and made no claim for monetary damages. *Id.* at 461. The court certified the action as a (b)(2) class because the defendants' alleged systematic and uniform practices of conducting workplace raids (common questions of fact) and the constitutionality of such raids (common questions of law) satisfied commonality, notwithstanding that there may have been individual factual differences within the proposed class. *Id.* at 461-62.

In *Coleman v. McLaran*, 98 F.R.D. 638 (N.D. Ill. 1983), nine taxpayers brought a class action against various Illinois counties for unconstitutional assessment of taxes on real estate. *Id.* at 641. The court, noting the similarity of the legal issues being raised, found commonality. *Id.* at 645.

In *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685 (E.D. Pa. 1977), a shareholder received (b)(3) certification for the defendant's alleged conspiracy to violate Rule 10(b)-5 of the Securities and Exchange Act of 1934. Commonality, defined and satisfied as a common nucleus of operative facts, was established by the conspiracy allegations, although there were different transactions and different documents involved in the alleged fraudulent or concealed information. *Id.* at 690-91.

In *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), a representative of a person killed in a fire at a supper club sued on behalf of the 200 persons injured or killed in the fire. *Id.* at 44. The court found commonality because the entire class consisted of business invitees. *Id.* at 46.

¹²⁹ See *WRIGHT ET AL.*, *supra* note 119, § 1763; see also *MOORE & KENNEDY*, *supra* note 98, ¶ 23.06[1].

competency of the presentation by representative or counsel are ensured by the commonality provision.

2. Typicality

Rule 23(a) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class”¹³⁰ On its face, typicality requires some nexus between representative and class claims or defenses. However, by choosing a series of amorphous generalities—“commonality,” “typicality,” and “adequacy of representation”—the rule drafters duplicated, overlapped, and ultimately confused the law. For example, in Rule 23(b)(3) (damage) class actions, the common questions must predominate over the uncommon questions, but the requirements of Rule 23(a) as to typicality and adequacy of representation also govern.¹³¹ Thus, in (b)(3) actions, even though it is contemplated that there will be some questions that are not common, the typicality requirement must also be satisfied. Typicality must, therefore, require something less than the historical identity of claims.

The meaning of typicality assigned by the federal courts is varied. A number of the courts labelled typicality as confusing and without definition.¹³² Other courts concluded that typicality had no independent meaning, equating it with commonality¹³³ or adequacy of representation.¹³⁴ Furthermore, a

¹³⁰ FED. R. CIV. P. 23(a)(3).

¹³¹ FED. R. CIV. P. 23(b)(3), 23(a)(3)–(4).

¹³² See *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980); see also *Duncan v. Tennessee*, 84 F.R.D. 21, 30 (M.D. Tenn. 1979) (noting that typicality is the most confusing part of Rule 23); *Inmates of Lycoming County Prison v. Strode*, 79 F.R.D. 228, 233 (M.D. Pa. 1978) (noting the confusion as to the meaning of typicality and then concluding that because all the named representatives were inmates, their claims were typical); *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 475 (N.D. Cal. 1978) (noting that there is a general confused state of the law as to what each of the elements of Rule 23(a) requires).

¹³³ In *Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657 (E.D. Pa. 1980), a single white female employed by Dean Witter in Pennsylvania sued on behalf a nationwide class, which included minority groups, for alleged employment discrimination. *Id.* at 660. In defining typicality, the court noted that it has historically had an illusive meaning and cited MOORE’S FEDERAL PRACTICE, *supra* note 98, for the conclusion that typicality has no meaning separate from other subsections. *Id.* at 667.

¹³⁴ In *Vulcan Society v. Fire Department*, 82 F.R.D. 379 (S.D.N.Y. 1979), an action was brought by several black fire fighters alleging discriminatory policies and practices within the four defendant municipalities’ fire departments. *Id.* at 384. Plaintiffs sought certification on behalf of all past, present, and future black employees of defendants’ fire departments. *Id.* at 398. The court stated that “[it] is questionable whether [the] Rule

substantial number of courts held that the representative satisfied typicality if the same position was taken by both the representative and the class on any one of the common questions of law or fact.¹³⁵

23(a)(3) requirement that plaintiffs' claims be 'typical' of those of the class has any meaning independent of Rule 23(a)(2) (common question) or [23](a)(4) (adequacy of representation). Much of the requirements of 23(a)(3) and 23(a)(4) overlap and require joint consideration here." *Id.* at 399 (citation omitted).

In *Chevalier v. Baird Savings Association*, 72 F.R.D. 140 (E.D. Pa. 1976), an action was brought under the Truth and Lending Act against savings institutions, alleging that they charged mortgagors interest from the date of settlement to the date of the first monthly payment. *Id.* at 143. The court deferred discussion of the typicality issue because it was ambiguous and added little or nothing to the other requirements of Rule 23. *Id.* at 144.

¹³⁵ In *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), a group of female employees sued for sex discrimination. *Id.* at 714. The court of appeals rejected the lower court's limitations on the action and declared that the trial court bore a special responsibility to resolve the dispute by determining the facts regardless of the position of the individual plaintiff. *Id.* at 715.

In *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703 (E.D. Mich. 1985), the court, citing *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), held that objections by members of the class are not sufficient grounds for disproving the settlement so long as the gross settlement amount is reasonable. *In re Jackson*, 107 F.R.D. at 710. The court ran through the 23(a) factors in a cursory manner, concluding that the claims of the named plaintiffs were typical. The result of the case was a mass tort mandatory certification, cutting off constitutional rights of all prisoners. *Id.* at 710-14. Note that this case was decided after *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).

In *Lewis v. Capital Mortgage Investments*, 78 F.R.D. 295 (D. Md. 1977), a single shareholder alleging violation of the securities law was certified to sue on behalf of a class of approximately 5,000 shareholders. *Id.* at 299-301.

In *Fujita v. Sumitomo Bank*, 70 F.R.D. 406 (N.D. Cal. 1975), a sex discrimination suit was brought on behalf of all present and future female employees of Sumitomo Bank throughout California who were denied employment and opportunity for advancement or promotion, were hired at lower grades, or were otherwise denied employment opportunities on the basis of sex. *Id.* at 408. The named plaintiffs were three terminated employees. The class issues were broadly defined as being all sex discrimination issues. Because the hiring policies were handled by a central personnel department, the claims, although they arose in one branch, were deemed representative for all 21 branches of the bank without analysis of divergence of issues, claims, and remedies. *Id.* at 410.

In *Richardson v. Hamilton International Corp.*, 62 F.R.D. 413 (E.D. Pa. 1974), a single plaintiff sought monetary damages and rescission of a merger that allegedly violated securities laws. *Id.* at 415. The court narrowly defined qualifications of an adequate class representative as being the competency of the attorney for the class and the avoidance of collusive suits or antagonistic interests. *Id.* at 420. The court certified the class with only

In *Karan v. Nabisco, Inc.*,¹³⁶ a sex discrimination employment suit was brought by two employees at Nabisco's Pittsburgh bakery on behalf of all present and future female employees of Nabisco's bakeries throughout the United States.¹³⁷ The two individual plaintiffs complained of discrimination against females in layoffs, seniority, wages, job classifications, promotions, job transfers, overtime opportunities, shift selections, job biddings, grooming policies, maternity benefits, and harassment of women who were placed in male jobs.¹³⁸ Although many issues were raised by the complaint, the named representatives did not individually have claims for the complained injuries. Moreover, Nabisco operated eleven other bakeries, each of which applied its own terms and conditions of employment and bargained separately with different local unions.¹³⁹ The court defined typicality as

directing an analysis into whether the factual and legal situations of the representatives are similar to those of the rest of the class so that an inordinate emphasis will not be placed on their unique individual circumstances, and whether their contentions concerning the common factual and legal issues are similar to those of the class.¹⁴⁰

Thus, *Karan* adds nothing to class analysis beyond the commonality requirement. Under this approach, there is typicality between the named plaintiffs and the class claims.

A standard similar to the one employed in *Karan* states that when absent class members benefit from any question asserted by the representative there is typicality.¹⁴¹ Under this approach, typicality as a distinct requirement is almost eliminated.

one representative, although it was obvious that the possible claims and remedies within the class differed as to rescission and damage recovery. *Id.*

¹³⁶ 78 F.R.D. 388 (W.D. Pa. 1978).

¹³⁷ *Id.* at 395.

¹³⁸ *Id.*

¹³⁹ *Id.* at 404.

¹⁴⁰ *Id.* at 405.

¹⁴¹ In *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978), the complaint alleged "across-the-board" discrimination in the areas of training, transfers, promotional opportunities, and job classification, contending that the union cooperated with the company in those practices. *Id.* at 1368. The court upheld the trial court's ruling to certify the class under (b)(2) because of one common allegation of racial discrimination, even though the named plaintiffs had in fact suffered by only limited practices. *Id.* at 1372.

In *Gill v. Monroe County Department of Social Services*, 79 F.R.D. 316 (W.D.N.Y. 1978), an action was brought by 36 past, present, and potential employees of the county

The nexus test adopted by some courts states that typicality is satisfied if there is a nexus between representative and class issues.¹⁴² Phrased yet another way, typicality is met if the representative's claims bear a relationship to the class claims.¹⁴³

According to a number of courts, if the representative's claims were derived from the same course of conduct and were based on the same legal theory, typicality was satisfied.¹⁴⁴ In *Lewis v. Capital Mortgage Investments*,¹⁴⁵ there were different documents involving purchases at different times, which allegedly contained misrepresentations. Typicality was satisfied because of the alleged common course of conduct. This represents another "across-the-board" case. The limited claim of the named representative did not provide motivation to litigate or settle all the class claims, yet if the representative lost, the class was bound.

Department of Social Services on behalf of 120 members of the work force who alleged employment discrimination on the basis of race, sex, and national origin. *Id.* at 322. Although the thrust of the representatives' complaints involved promotion discrimination by various methods, including discriminatory civil service tests, lack of job posting, use of provisional appointments, and lack of objective systems for evaluating job performance, the class was certified to sue for alleged unequal pay, retaliatory action, discriminatory demotions and layoffs, and discriminatory recruitment and hiring. *Id.* at 323-24.

¹⁴² In *Oneida Indian Nation v. New York*, 85 F.R.D. 701 (N.D.N.Y. 1980), the Oneida Indian tribe sued for the rights to five million acres of land in the state of New York. *Id.* at 703. The court certified a defendant's class with 152 named defendants as representatives of the proposed class of all persons claiming property interests within the relevant geographic area. The common legal issue involved was whether the validity of certain transactions that occurred in 1785 and 1788 could be attacked. *Id.* at 705. Typicality was satisfied without analyzing separate defenses available to various classes of homeowners and the state. *Id.*

In *Esler v. Northrop Corp.*, 86 F.R.D. 20 (W.D. Mo. 1979), a plaintiffs' class alleging violation of pension rights in connection with the acquisition and shutdown of various plants was certified. *Id.* at 24. The court stated that the typicality requirement overlaps the commonality issue, and all that need be established is that the plaintiff demonstrate some nexus with the claims of the class. *Id.* at 35.

¹⁴³ See *Gramby v. Westinghouse Elec. Co.*, 84 F.R.D. 655, 659 (E.D. Pa. 1979) (holding that so long as the plaintiff's claim is not unique and particularized, there is typicality).

¹⁴⁴ In *Edmondson v. Simon*, 86 F.R.D. 375 (N.D. Ill. 1980), a single black female plaintiff sued for sex and racial discrimination against the Chicago branch of the IRS. *Id.* at 379. The court held that typicality is satisfied when plaintiffs' claims arise from the same event, practice, or course of conduct because the class claims and the plaintiffs' claims are based on the same legal theory even though the acts and remedies differ substantially. *Id.* at 380-81.

¹⁴⁵ 78 F.R.D. 295, 301-02 (D. Md. 1978).

Other commentators state that typicality is satisfied if the representative's claims or defenses and the class's claims or defenses stem from a "single event or are based on the same legal or remedial theory."¹⁴⁶ The cases cited as supporting this standard are primarily single legal issue cases in which the defendants were accused of violating a single constitutional or other legal standard, and the factual differences among the class had little or no relevance to the desired remedy.¹⁴⁷ To illustrate, if the complaint alleges a denial of due process in the changing of Medicaid rights without adequate notification, a class suit is appropriate to determine the due process right to notice. This is a single legal issue. On the relevant fact of whether due process requires notice, the representative and class claims are identical and the class adjudication is desirable.

Such cases should not be interpreted as saying that identity of legal theories between the class and the representative necessarily justifies class certification. For example, one prison inmate claiming civil rights violations for violence against him cannot justify a class in other institutions involving different acts and practices merely because the same legal theory of civil rights is asserted.

Still other courts have defined typicality by adopting a "markedly different position" test. Professors Wright, Miller, and Kane discussed this test as follows: "Rule 23(a)(3) may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are raised."¹⁴⁸ Precisely when a position is "markedly different" is undefined, and some courts have loosely applied this standard to undermine the identity of claims requirements.¹⁴⁹ The test refers to positions, not claims or the liability elements of claims.¹⁵⁰ Under this standard,

¹⁴⁶ See *Kuenz v. Goodyear Tire & Rubber Co.*, 104 F.R.D. 474 (E.D. Mo. 1985) (certifying an action brought for sex discrimination against Goodyear by two named women alleging nationwide discrimination); *WRIGHT ET AL.*, *supra* note 119, § 1764.

¹⁴⁷ See *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985); *Weiss v. York Hosp.*, 745 F.2d 786, 809-10 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

¹⁴⁸ *WRIGHT ET AL.*, *supra* note 119, § 1764.

¹⁴⁹ See, e.g., *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D. Cal. 1978).

¹⁵⁰ In *Peil v. Speiser*, 97 F.R.D. 657 (E.D. Pa. 1983), a securities class action based on allegedly false and misleading information distributed to stockholders was certified. The court found that the fact that there may be defenses applicable to the named representative's claim that are atypical of the class does not defeat the representation. *Id.* at 659-60.

In *Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657 (E.D. Pa. 1980), a single white female employed by Dean Witter in Pennsylvania sued on behalf of a nationwide class of all female, black, and Spanish-surnamed Americans and other minority employees and job applicants of Dean Witter. The court cited to Wright and Miller's definition that there is

the representative with one claim may represent unrelated class claims so long as the factual position on the unrelated claims is similar. The class is not thereby protected, however, by the self-interest of the representative claimant.

Only a small number of federal courts between 1966 and 1982 made a rigorous examination of representative and class claims and concluded that such claims must be the same¹⁵¹ or coextensive¹⁵² in accordance with historically approved standards.

3. *Adequacy of Representation Prior to General Telephone*

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."¹⁵³ Although the Rule obviously overlaps "commonality" and "typicality," those concepts more specifically refer to issues, claims, and defenses. To minimize duplication and confusion, the overwhelming majority of federal courts from 1966 to 1982 chose to restrict (a)(4) analysis to issues of competency in presentation and conflicts of interest. Adequacy of representation by such interpretation did not require an analysis of identity of claims as between the representative and the class.¹⁵⁴

typicality so long as the legal or factual position of the representatives are not markedly different from that of the class. *Id.* at 667-73. Typicality also exists where the plaintiff has demonstrated some nexus. The court said that the nexus definition does not differ from the "markedly different" position formulation of typicality. Applying these definitions, the court upheld a class on behalf of all females nationwide including applicants for hiring; however, the named plaintiff could not represent black and other minority groups. *Id.* at 660-62.

In *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978), 20 Baskin-Robbins franchisee owners brought an antitrust action against the ice cream company alleging various violations from tie-in sales to fixing wholesale and resale prices. *Id.* at 112. There were differences within the franchisee class in part because they were from different regions and each region was administered separately. *Id.* at 114. Moreover, the named representatives made numerous unauthorized substitutions of supply items and had not followed the suggested retail prices of Baskin-Robbins. *Id.* Nevertheless, the court certified the class under the markedly different position test. *Id.* at 114-16. *See also* *Barlow v. Marion County Hosp. Dist.*, 88 F.R.D. 619 (M.D. Fla. 1980).

¹⁵¹ *See* *Marcello v. Regan*, 574 F. Supp. 586 (D.R.I. 1983); *Coleman v. McLaren*, 98 F.R.D. 638 (N.D. Ill. 1983); *Penk v. Oregon State Bd. of Higher Educ.*, 93 F.R.D. 45 (D. Or. 1981); *Payton v. Abbott Labs.*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983).

¹⁵² *See* *Rental Car, Inc. v. Westinghouse Elec. Corp.*, 496 F. Supp. 373 (D. Mass. 1980); *Chmielewski v. City Prods. Corp.*, 71 F.R.D. 118 (W.D. Mo. 1976).

¹⁵³ FED. R. CIV. P. 23(a)(4).

¹⁵⁴ The cases cited *supra* notes 132-141 define and apply (a)(4) adequacy of representation as not including identity of claims. *See also* *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1371-73 (6th Cir. 1977) (upholding, on a direct interlocutory

Evidence that "adequacy of representation" does not require an identity of claims is further supported by the fact that the requirement applies to (b)(3) as well as (b)(1) and (b)(2) categories. A (b)(3) action, by definition, involves questions of law and fact common to the class which dominate questions affecting only individual members. Thus, (b)(3) class actions potentially involve both disparate and homogeneous interests on liability as well as damage elements. However, Rule 23(a) requires that "adequacy of representation" in (b)(3) cases. Maintaining this requirement in class cases involving disparate

appeal, class certification in a civil rights "across-the-board" case), *cert. denied*, 436 U.S. 946 (1978); *Yearsly v. Scranton Hous. Auth.*, 487 F. Supp. 784, 786-87 (M.D. Pa. 1979) (defining adequacy of representation as competency of counsel plus absence of proof that the plaintiff has a conflict of interest; moreover, the court noted that there were a number of possible factual distinctions within the class and failed to consider the possible range of remedies which might have been sought by such class); *Kane Assoc. v. Clifford*, 80 F.R.D. 402, 409 (E.D.N.Y. 1978) (stating that the standard for determining adequacy is not whether the representative has identical issues with absent class members, but whether the representative may be expected to prosecute the class claims vigorously and whether the representative has claims antagonistic to the claims of the class); *Richardson v. Hamilton Int'l Corp.*, 62 F.R.D. 413, 420-21 (E.D. Pa. 1974) (defining adequacy of representation as the qualifications of the attorney for the class and the avoidance of collusive suits or antagonistic interests; using this definition, the court certified the class with only one representative although it was obvious that the possible claims and remedies of members of the class might differ); *see generally* *Bowen v. General Motors Corp.*, 685 F.2d 160 (6th Cir. 1982); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978); *Garonzik v. Shearson Hayden Stone, Inc.*, 574 F.2d 1220 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976); *Michaels v. Ambassador Group, Inc.*, 110 F.R.D. 84 (E.D.N.Y. 1986); *International Molders' & Allied Workers' Local 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983); *In re Victor Tech. Sec. Litig.*, 102 F.R.D. 53 (N.D. Cal. 1984); *Beebe v. Pacific Realty Trust*, 99 F.R.D. 60 (D. Or. 1983); *Barlow v. Marion County Hosp. Dist.*, 88 F.R.D. 619 (M.D. Fla. 1980); *Vulcan Soc'y v. Fire Dep't*, 82 F.R.D. 379 (S.D.N.Y. 1979); *Morgan v. Laborers Pension Trust Fund*, 81 F.R.D. 669 (N.D. Cal. 1979); *Gill v. Monroe County Dep't of Social Servs.*, 79 F.R.D. 316 (W.D.N.Y. 1978); *Inmates of Lycoming County Prison v. Strode*, 79 F.R.D. 228 (M.D. Pa. 1978); *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685 (E.D. Pa. 1977); *Black Grievance Comm. v. Philadelphia Elec. Co.*, 79 F.R.D. 98 (E.D. Pa. 1978); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977); *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682 (D.D.C. 1977); *Chevalier v. Baird Sav. & Loan Ass'n*, 72 F.R.D. 140 (E.D. Pa. 1976); *Bentowski v. Marfuerza Compania Maritima S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976).

For a scholarly analysis of adequacy of representation see MOORE & KENNEDY, *supra* note 98, ¶ 23.07; WRIGHT ET AL., *supra* note 119, §§ 1766, 1767, 1769.1.

issues undercuts the position that identity of claims is a part of adequacy of representation.

An additional standard included in (a)(4) adequacy of representation is an absence of a conflict of interest. A conflict of interest inquiry centers primarily on interests outside the lawsuit, which bear on competency of presentation and not on identity of claims, except in a limited manner.¹⁵⁵ In particular, a conflict of interest standard does not limit an overreaching representative or counsel from asserting claims beyond those possessed by the representative.¹⁵⁶

Historically, identity of claims was the primary protection for absent class members.¹⁵⁷ If the representative was asserting the same claims as those possessed by the class, then the economic interest of the representative and of the class was one, and the presumed self-interest of the representative would ensure competent presentation of the class issues. The underlying assumption was that all persons desire a greater share of goods and wealth. Moreover, a representative with the same claim as the class presumably has sufficient evidence, individual injury, and emotional involvement to present the claim ably. The representative and counsel who aver claims beyond their own evidence, injury, and direct concern are "overreaching." In presentation, and more significantly in settlement, overreaching claims lack focus and effort and may be ignored or traded away in order to reach a result favorable to the named representative.

There are various influences which encourage overreaching claims and may lead to judgments or settlements in which substantial claims of class members are lost by *res judicata*. It is in the self-interest of the class counsel and representatives to frame the complaint as broadly as possible, thereby gaining more bargaining chips for settlement, legal fees, and trial. The persons opposing the class also desire broad definitions of class claims in order to enlarge the scope of *res judicata* and ensure universal release should they settle or win in whole or in part. At trial, the representative may throw away or weakly represent certain class claims because of a lack of personal interest and

¹⁵⁵ Conflicts of interest may cover a situation when there is substantial conflict within the class as to whether a claim should be enforced, particularly if the representative would obtain a preference or benefit at the expense of the class.

¹⁵⁶ An overlapping requirement means that both the representative and the class must have standing to sue. Thus, the named representative and the class must have suffered threatened or actual injury. Although the standing requirement does not require identity of claims between the named representative and the class, the standing requirement is met even if the representative asserts a claim involving an injury that is separate and different from the class's injury.

¹⁵⁷ There was little or no discussion in the early cases of the quality and ability of the representative or counsel.

evidence. Similarly, in settlement negotiations the representative and the counsel may throw certain class claims "into the winds" in order to obtain a favorable and quick result.¹⁵⁸ Ultimately, the losers in the overreaching scenario are the absent class members.¹⁵⁹

VI. CLASS ACTION CATEGORIES AND THE WEAKENING OF NOTICE RIGHTS UNDER AMENDED RULE 23

In many class actions, particular issues are atypical and cannot be adequately represented. To illustrate, in a mass product liability action the issue of liability may be typical and adequately represented, but the causation and damage issues may differ for each absent member of the class, ultimately barring inclusion within the representative's claims. Similarly, in a fraud action, reliance and damages may differ for each member of the class and cannot be adequately represented using historical identity of claims requirements. In these cases, notice giving opportunity to appear or opt out becomes essential to bind a judgment on the atypical issues.

Notice giving opportunity to appear or to opt out fulfills fairness and due process in class cases as follows: (1) if the absent class member appears and participates pursuant to notice, the class member has had her day in court, and the case is no longer a representative action as to the appearing party; (2) if the class member opts out, she is not bound, and there can be no due process violation by the class action judgment; (3) if the class member neither appears

¹⁵⁸ See *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 16-18 (2d Cir. 1981).

¹⁵⁹ In *Kemp v. Birmingham News Co.*, 608 F.2d 1049 (5th Cir. 1979), an employee's civil rights action was barred by res judicata. The court held that res judicata was appropriate although the claims in the class action were not identical to the employee's individual claims. *Id.* at 1052.

In *Wren v. Smith*, 410 F.2d 390 (5th Cir. 1969), a group of prisoners at the Georgia State Penitentiary sued to block integration of prison facilities. Integration had been ordered in a prior class action and the prisoners were within the class designated as plaintiffs. *Id.* at 390. The court held that they were bound by the prior class action and dismissed their petition. *Id.* at 391.

In *Los Angeles Unified School District v. NAACP*, 714 F.2d 935 (9th Cir. 1983), the court held that a prior action settled not only every issue that was raised but also every issue that might have been raised. *Id.* at 940. Hence, all claims prior to the adjudication of the prior action were barred by res judicata. Although the class was not formally certified, the matter was handled as a class action, and the court held that relitigation was inappropriate. *Id.* at 945. See also *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986); *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979).

nor opts out, she may be deemed to have waived any objection and to have consented to be bound by the representation on the atypical claims, remedies, or issues.¹⁶⁰ All due process rights are personal and may be waived or satisfied by consent.¹⁶¹ The principles of waiver or consent assume that notice fully informs the absent class member of the situation so that a considered choice is possible.¹⁶²

During the certification process, the scope of claims within the class as compared to the named representatives and possible conflicting claims among members of the class may be unclear. Notice giving opportunity to appear or to opt out assists in clarifying the scope of class claims, remedies, and issues in relation to the representative claims.¹⁶³ Presumably, notifying all absent members of the class in a properly worded notice that clearly defines class and representative claims will encourage some response from class members. This response may lead to a better evaluation of the representation, a redefining of the class or its issues, or even decertification. Moreover, the failure to receive any response to a properly worded notice is evidence that adequacy of representation is satisfied.

The Advisory Committee drafting amended Rule 23 created four categories, based on uncertain generalities, that established a class right to notice giving opportunity to be heard or to opt out.¹⁶⁴ These categories were not created to protect absent class members, but, rather, turned on technical language that distracted from fairness and due process considerations.

Under Rule 23, there is no class right to notice giving opportunity to appear or opportunity to opt out if a class action is classified as a (b)(1)(A), (b)(1)(B), or (b)(2) action, although a court, in its discretion, may give such

¹⁶⁰ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

¹⁶¹ *Id.* at 812-13; see also *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites De Guinee*, 456 U.S. 694, 703-04 (1982).

¹⁶² Many, if not most, class action notices are inadequate and misleading. Typically, notice does not describe the atypical issues and problems of adequacy of representation. Notice may be misleading in stating that adequacy of representation has already been established by the court in a certification hearing. For a class member to properly make the decision to waive rights or consent to representation, the notice should describe with specificity the representative claims, the class claims, and the differences therein, if any, as well as the qualifications of the representative and counsel.

¹⁶³ Although this discussion links opportunity to appear and opportunity to opt out under Rule 23(c)(2), the two concepts are separate. Due process may be satisfied by waiver or consent based upon notice giving opportunity to be heard without opt out rights or based upon notice giving opt out rights without an opportunity to be heard.

¹⁶⁴ FED. R. CIV. P. 23(b).

rights.¹⁶⁵ Such actions have been labelled as “mandatory” class actions in the sense that the parties must remain in the action and are thereafter bound.

A. *The (b)(1)(A) Category*

The (b)(1)(A) category is defined by the interests of the opponent to the class. Rule 23(b)(1)(A) states that if the opponent is facing incompatible standards of conduct from the contentions of divergent parties, a class action is appropriate.¹⁶⁶

The breadth of the language is astonishing. All litigation, even litigation for damages, has the potential to affect a defendant’s standard of conduct. For instance, a suit for nuisance damages may be won by some claimants and lost by others, thereby creating incompatible standards of conduct for the person opposing the class.¹⁶⁷ Thus, damage actions which are normally construed as (b)(3) actions may also fall within the language of (b)(1)(A),¹⁶⁸ and the court

¹⁶⁵ *Id.*

¹⁶⁶ Section 23(b)(1)(A) of the Federal Rules of Civil Procedure reads as follows:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class

FED. R. CIV. P. 23(b)(1)(A).

¹⁶⁷ Also consider a governmental authority with responsibility to build a dam. This authority may face a multipolar community reaction: some oppose the dam, some favor it only if limited in area, others desire a larger dam with a larger lake in order to provide more electric power. Although some of these litigants are seeking damages and others are seeking injunctions, there are still incompatible standards of conduct facing the opponent.

¹⁶⁸ The incompatible conduct language in (b)(1)(A) is similar to Rule 19, also amended in 1966. FED. R. CIV. P. 19. However, this phrase is only one factor in determining indispensable or necessary parties under Rule 19. In complying with Rule 23, the remaining factors bearing on compulsory joinder under Rule 19 are ignored. Incompatible standards of conduct become the basis of a binding mandatory class action regardless of other factors or competing interests. Rule 19, for example, requires an examination of the interests of the claimant, the interests of the absent members, and the social interest in the light of “equity and good conscience.” See generally *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

may deny notice giving opportunity to appear or to opt out.¹⁶⁹ This possible confusion has caused some courts to say that (b)(1)(A) does not apply to damage actions.¹⁷⁰

The (b)(1)(A) category contemplates antagonistic interests within the class that cause the defendant to engage in divergent and incompatible standards of conduct. Such divided interests raise an adequacy of representation concern, especially since notice giving opportunity to appear, which might reveal the range of contentions or a need for additional representatives or subclasses, is not required.

However, in a (b)(1)(A) class, the focused concern is on the party opposing the class, not the protection of absent class members. As such, it may be rational to deny opt out rights in these cases in order to have an effective resolution of all the claims imposing conflicting standards on the party opposing the class. This is particularly true when there are inconsistent injunctive orders being sought that would subject the person opposing the class to divergent orders and the possibility of civil or criminal contempt enforceable by fines or incarceration. A conflicting injunctive order situation would also fall within the (b)(2) category, discussed below.

Denying opt out rights to the absent class members in (b)(1)(A) cases does not mean that notice giving opportunity to appear should also be denied, as is now authorized by Rule 23. Indeed, the multipolar conflicts within the class strongly suggest that opportunity to be heard should be given so that all of the protesting points of view can be brought forth and fairly adjudicated, so questions of the adequacy of representation can be fully revealed.¹⁷¹

B. *The (b)(1)(B) Category*

The (b)(1)(B) category stresses the interests of the members of the class whose claims may be impaired or impeded unless a class action is certified.¹⁷²

¹⁶⁹ See *Reynolds v. NFL*, 584 F.2d 280, 283-84 (8th Cir. 1978); *Robertson v. NBA*, 556 F.2d 682, 684-85 (2d Cir. 1977).

¹⁷⁰ See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976); *WRIGHT ET AL.*, *supra* note 119, § 1773 n.4.

¹⁷¹ Defining and applying the typicality and adequacy of representation requirements becomes difficult under (b)(1)(A). If adequacy is reduced to a typicality standard, how could an adequate representative be typical with respect to the class, and thereby operate to bind all absent members, if the class has incompatible positions and interests? This would clearly violate both identity of claims and conflicts of interest concepts unless subclasses are created.

¹⁷² Section 23(b)(1)(B) of the Federal Rules of Civil Procedure reads as follows:

However, the chosen phrase, "impaired or impeded," is broad and uncertain.¹⁷³ Court holdings, commentaries, and historical precedent show that class actions may be used to prevent a "race to judgment" in which the first claimants to execute are paid in full but later claimants receive nothing due to depleted assets.¹⁷⁴ A related type of case involves claims to a single piece of property by multiple members of a class. In these "limited fund" cases, an individual judgment clearly impairs or impedes the interests of other claimants.

The (b)(1)(B) category is not restricted to limited fund situations. The impairing or impeding concept is potentially one of great elasticity.¹⁷⁵ For instance, does the offering of a settlement "fund" satisfy the standard? If the "impaired or impeded" language is satisfied whenever a settlement is offered for less than the total amount of the claims, any damage action may be easily converted into a (b)(1)(B) action, and rights to appearance and to opt out are denied.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

....

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests

FED R. CIV. P. 23(b)(1)(B).

¹⁷³ The (b)(1)(B) category is not a restatement of the old hybrid class action which involved class interests in the same property or subject matter of the action. The (b)(1)(B) category does not require a claimed interest in the same fund or property; it turns on the practical effect of the classification upon the members of the class. Language of similar effect is found in Rule 24. FED. R. CIV. P. 24. However, the language adopted by the committee for the (b)(1)(B) action is free from historic restraints imposed by related Rules 19 and 24. FED. R. CIV. P. 19, 24.

¹⁷⁴ See *Reynolds v. NFL*, 584 F.2d 280, 283 (8th Cir. 1978); *Robertson v. NBA*, 556 F.2d 682, 684-85 (2d Cir. 1977); *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 528, 536-37 (S.D. Fla. 1986). See generally *Brown v. Bolger*, 102 F.R.D. 849 (D.D.C. 1984).

¹⁷⁵ Is this standard satisfied when potential class claims exceed the assets of the defendants? How is the total amount of potential claims to be evaluated? By what process are the potential assets of the defendants (including insurance coverage) to be weighed? What investigation of potential liability versus potential assets should be made by the court? See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984); *In re Greenman Sec. Litig.*, 94 F.R.D. 273 (S.D. Fla. 1982); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977).

Impairing or impeding the interest of class members is an uncertain guide. This language, used in Rules 19 and 24, has been construed to be satisfied when the absent party is adversely affected by the stare decisis effect of litigation. However, if absent class members impaired by stare decisis qualify under (b)(1)(B), every potential class action is classifiable as (b)(1)(B), and notice giving appearance and opt out rights may be denied. For this reason, some courts have interpreted the impaired or impeded standard as not including stare decisis effects.¹⁷⁶

C. *The (b)(2) Category*

The (b)(2) category involves either injunctive relief or corresponding declaratory relief.¹⁷⁷ Of course, any type of action may involve declaratory relief, at least in part. An action for product liability, for example, may initially request a declaration of liability against the defendant.¹⁷⁸ The declaratory ruling may have utility in obtaining an injunction in a subsequent proceeding as well as providing a basis for damages. As such, any case may qualify for potential declaratory relief on certain issues even though the ultimate objective of the case may be either injunctive relief or damages. The issue is whether such cases involve "corresponding declaratory relief" within the meaning of (b)(2).

A related issue is whether combined injunction and damage actions may be certified as (b)(2) when the predominant objective is damages. The courts are in conflict on this issue. Some courts have held that the possibility of a damage award means that the full (b)(3) rights must be afforded even in a declaratory

¹⁷⁶ See *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 864 (1977); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973); see also *WRIGHT ET AL.*, *supra* note 119, § 1774 n.4.

¹⁷⁷ Section 23(b)(2) of the Federal Rules of Civil Procedure reads as follows:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

FED. R. CIV. P. 23(b)(2).

¹⁷⁸ *WRIGHT ET AL.*, *supra* note 119, § 1775 n.20.

relief action.¹⁷⁹ Other courts have held that claims which combine injunctive and damage relief should be classified as mandatory.¹⁸⁰

D. *The (b)(3) Category*

The (b)(3) category of class actions is for damages. In order to maintain a (b)(3) action, the requirements of Rule 23(a) and additional special requirements must be met.¹⁸¹ Rule 23(c)(2) provides that, in a (b)(3) action, notice giving opportunity to appear and to opt out must be given in the best

¹⁷⁹ See *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 993 (5th Cir. 1981); *Johnson v. General Motors Corp.*, 598 F.2d 432, 437-38 (5th Cir. 1979).

¹⁸⁰ See *Dosien v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *Laskey v. International Union*, 638 F.2d 954, 956-57 (6th Cir. 1981); *Reynolds v. NFL*, 584 F.2d 280, 284 (8th Cir. 1978); *Robertson v. NBA*, 556 F.2d 682, 686 (2d Cir. 1977).

¹⁸¹ Section 23(b)(3) of the Federal Rules of Civil Procedure reads as follows:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

....

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED R. CIV. P. 23(b)(3).

These requirements obviously bear upon all class action categories. The structure of Rule 23(b)(3) does not mean that (b)(1) and (b)(2) class actions may have predominating uncommon questions, that the class device need not be superior to other procedural devices such as *stare decisis*, *interpleader*, or *intervention*, that the individual's interest in controlling litigation is irrelevant to (b)(1) and (b)(2) classes, or that judicial economy and manageability are not concerns in the (b)(1) and (b)(2) cases. Numerous cases cited below apply the above requirements to (b)(1) and (b)(2) class actions as well as (b)(3) class actions, although such conditions are not apparent from the face of the Rule.

practicable manner,¹⁸² including individual notice if the names and addresses of the class are available upon reasonable inquiry. Such notice may be something beyond the reasonable notice required by the constitutional *Mullane v. Central Hanover Bank & Trust Co.*¹⁸³ standard and may be expensive, a factor prompting some federal judges to classify actions as (b)(1) or (b)(2).¹⁸⁴

E. *The Impact of Categorization*

Rule 23 leaves the giving of notice, appearance rights, and opt out rights on (b)(1) and (b)(2) cases to the discretion of the trial judge. This fails to recognize that such orders may, in certain cases, be mandated under due process.¹⁸⁵ As a part of the discretionary notice provision, Rule 23 lists some of the advantages of notice for absent members of the class: notice may inform the court whether the class considers the representation to be fair and adequate and notice may influence the class to intervene and present claims, defenses, or otherwise appear in the action.¹⁸⁶

¹⁸² FED. R. CIV. P. 23(c).

¹⁸³ 339 U.S. 306, 315 (1950).

¹⁸⁴ A key pragmatic factor is the issue of who pays for notice. Absent a settlement, notice costs in the federal system are initially advanced by the plaintiff or class counsel. Hence, the avoidance of substantial up-front costs is additional motivation for class representatives and counsel to seek certification as something other than a (b)(3) class.

¹⁸⁵ In explaining discretionary notice, the Advisory Committee commented indirectly that, to the degree that there is cohesiveness or unity in the class and that representation is adequate, the need for notice will be minimal. The Advisory Committee observed that mandatory and discretionary notice provisions are designed to fulfill requirements of due process, citing *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). FED. R. CIV. P. 23(d)(2) advisory committee's note (1966). However, Rule 23, itself, fails to alert the legal community to the requisite analysis of claims which are essential in evaluating cohesiveness or unity of the class.

¹⁸⁶ Section 23(d)(2) of the Federal Rules of Civil Procedure reads as follows:

(d) *Orders in Conduct of Actions.*

. . . .

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action

FED. R. CIV. P. 23(d)(2).

The court is empowered to create subclasses and to appoint adequate representatives for each of the subclasses. The court further has the power to limit the issues as well as define the scope of the class action. By making such limitations, potential due process problems may be alleviated;¹⁸⁷ however, listing techniques for solving due process is not a substitute for clarity within Rule 23 when there is a due process issue.

The adverse impact of the categories and structure of the amended Rule may be summarized as follows:

(1) *Distraction and confusion resulting from combining two separate and distinct issues.* (A) Should a class action that is the superior device in efficiently resolving disputes be permitted? (B) What protection should be given as a matter of fairness and due process to absent class members?

The categories have outlived their utility. Class actions are now accepted as efficient. The only test should be, "Is the device superior to other procedural methods of adjudication?" The categories demand extensive legal effort and hairsplitting, thereby distracting from the analysis of fairness.

(2) *The fallacy of mandated notice for (b)(3) but not for (b)(1) or (b)(2) actions.* In determining whether notice is required, the primary issue should be adequacy of representation through identity of claims. If there is historic identity of claims, fairness and due process are satisfied and notice is not required, although discretionary notice may be appropriate. If there is not an identity of claims or if evidence of identity is insufficient, notice should be required.

The (b)(1) and (b)(2) (no notice required) versus (b)(3) (notice required) categories are not structured according to identity of claims. For instance, a case seeking declaratory or injunctive relief ((b)(2)) involving integration in Los Angeles schools may involve diverse claims and conflicting remedies. Yet classifying this action as (b)(2) means that notice and opportunity to be heard as well as opt out rights are not required. On the other hand, a (b)(3) action may involve "homogeneity" and identity of claims if all claimants have a single interest in the maximum recovery of damages on a single issue. However, in (b)(3) actions, notice and opt out rights are required.

¹⁸⁷ Rule 23(b)(3) does not discuss the issue of binding out-of-state claimants, nor does it make observations or requirements for the special problems of defendant class actions.

(3) *The irrational linking of notice giving opportunity to appear with notice giving opportunity to opt out.* These two concepts have different rationales and purposes. To illustrate, in (b)(1)(A) or (b)(1)(B) cases, opt out rights should ordinarily not be given because the exercise of such rights: (A) defeats the resolution of divergent claims seeking incompatible standards of conduct or (B) may result in a race to judgment. On the other hand, because of the conflicting and divergent interests of the class, notice giving opportunity to be heard should be afforded.¹⁸⁸ This combination of opportunity for hearing and opt out rights has caused many courts to refuse notice altogether.

The Advisory Committee's explanation as to why notice is required under (b)(3) and not under the other categories is that individual interest is greater in a (b)(3) claim.¹⁸⁹ It assumes that there is less individual interest in seeking damages than in pursuing actions involving injunctions or declaratory relief, actions in which an entity opposing the class may face incompatible standards of conduct, or actions in which absentee parties may, as a practical matter, have their interests impaired. The Advisory Committee gives no reason for making these tenuous assumptions.

(4) *The conflicting structure of (a)(3) and (a)(4) requirements in (b)(3) cases.* The (a)(3) (typicality) and (a)(4) (adequacy of representation)

¹⁸⁸ Some confusion is generated by labeling (b)(1) and (b)(2) classes as "mandatory" and (b)(3) classes as "discretionary." These labels focus on the right to opt out. If the focus is notice, it may be argued that a (b)(3) class action is "mandatory" because notice must be given and a right of opt out must be afforded, whereas (b)(1) and (b)(2) class actions are "discretionary" because the giving of notice and opt out rights is not required.

¹⁸⁹ Section 23(c)(2) of the Federal Rules of Civil Procedure reads as follows:

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

. . . .

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through counsel

requirements historically require an identity of liability claims between representative and class. However, (b)(3) cases may include claims in which there are nonpredominating liability questions affecting only individual members of the class. How can representative claims be typical so long as there are uncommon liability claims, and how can uncommon liability claims be adequately represented under an identity of claims standard?¹⁹⁰ Rule 23 should make it clear that if there are nonpredominating liability claims affecting only individual members, fairness and due process are satisfied by notice giving appearance and opt out rights. The nonexercise of appearance or opt out rights acts as consent.

VII. *GENERAL TELEPHONE CO. v. FALCON* AND THE RESTORATION OF THE IDENTITY OF CLAIMS STANDARD

In *General Telephone Co. v. Falcon*,¹⁹¹ an across-the-board racial discrimination class action was brought against General Telephone by one of its employees who individually complained of denial of promotions and also asserted class claims for racial discrimination in hiring. The class was broadly defined as all those who suffered racial discrimination, including past, present, and future employees, as well as applicants for employment.¹⁹²

A unanimous Court held that Title VII of the Civil Rights Act of 1964 is subject to class action rules pertaining to commonality, typicality and adequacy of representation.¹⁹³ Furthermore, the Court stated that these concepts tend to merge, serving as guideposts for determining whether maintenance of a class action is economical and whether the interests of the absent class members will be fairly and adequately protected.¹⁹⁴

The standard of adequate protection requires that the class representative be part of the class and “(‘possess the same interest and suffer the same injury’ as the class members.”¹⁹⁵ Rule 23(a) requirements “effectively (‘limit the class claims to those fairly encompassed by the named plaintiff’s claims.’”¹⁹⁶

¹⁹⁰ See *Mattoon v. City of Pittsfield*, 128 F.R.D. 17 (D. Mass. 1989), in which the court found typicality and adequacy of representation ((a)(3) and (a)(4)) but denied (b)(3) certification because the uncommon claims predominated. *Id.* at 19–20.

¹⁹¹ 457 U.S. 147 (1982).

¹⁹² *Id.* at 151.

¹⁹³ *Id.* at 157–61.

¹⁹⁴ *Id.* at 157 n.13.

¹⁹⁵ *Id.* at 156 (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

¹⁹⁶ *Id.*

The Court noted the district court's error in certifying without carefully evaluating whether the named plaintiff was a proper class representative. The Court stated the following:

The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). . . . Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.¹⁹⁷

Thus, according to the Court's analysis, it is error to presume an identity of claims without identifying the questions of law or fact common to representative and class.

The need for the identity of claims requirement was evidenced by the Court's reference to the specially concurring opinion of Judge Godbold in a Fifth Circuit decision:

'[W]ithout reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend' He [Judge Godbold] termed as 'most significant' the potential unfairness to the class members bound by the judgment if the framing of the class is overbroad 'And he pointed out the error of the 'tacit assumption' underlying the across-the-board rule that 'all will be well for surely the plaintiff will win and manna will fall on all members of the class'. . . . With the same concerns in mind, we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.¹⁹⁸

The requirement that class claims be fairly encompassed within the representative's claims was repeatedly stressed by the Court, which illustrated how to meet the "fairly encompassed" standard.¹⁹⁹ In the Court's illustration,

¹⁹⁷ *Id.* at 160.

¹⁹⁸ *Id.* at 161 (quoting *Johnson v. Georgia Highway Express Inc.*, 417 F.2d 1122, 1125-27 (5th Cir. 1969) (Godbold, J., specially concurring)).

¹⁹⁹ "If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Id.* at 159 n.15.

the individual plaintiff is motivated and has evidence to prove the defendant's use of a biased testing procedure in hiring.²⁰⁰ The evidence supports the claims of the entire class that has been injured by the same biased testing procedure, even though each class member must establish its own damage. The self-interest of the representative inures to the benefit of the class.²⁰¹

Having based its decision on the Rule's language, the Supreme Court did not find it necessary to define the constitutional due process requirements. Thus, the full impact of this decision on state court class actions under the due process requirements of the Fourteenth Amendment was not addressed.

The commentaries have ignored the language and reasoning of *General Telephone* by restricting its holding to civil rights cases.²⁰² According to Professors Wright, Miller, and Kane, typicality is satisfied if the representative uses the same legal or remedial theory as the class.²⁰³ Similarly, Professor Newberg does not alter his analysis of typicality and adequacy after *General Telephone* and relegates the impact of that decision to employment

²⁰⁰ *Id.*

²⁰¹ *Id.* The next part of the illustration is less clear. It states as follows:

Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination.

Id.

To apply this general policy exception, suppose the plaintiff alleged: (1) there was a general policy by the employer to discriminate racially in all employment practices, (2) this policy was applied in conjunction with all subjective decisionmaking, and (3) plaintiff was denied promotion by reason of discrimination pursuant to this policy. Proof by the plaintiff under (1) and (2) will prove the class claims and, thus, "fairly encompass" them if the "general policy exception" means that a single policy of discrimination governed all subjective decisionmaking. The clear rejection of the across-the-board approach and the repeated mention of same interest, same injury, and fairly encompassed class claims as standards represent, in effect, the restoration of the historic requirement of identity of claims between the class and the representatives.

²⁰² WRIGHT ET AL., *supra* note 119, § 1771.

²⁰³ *Id.* §§ 1764–65; *see also* MOORE & KENNEDY, *supra* note 98, ¶¶ 23.06–.07.

discrimination cases.²⁰⁴ Moreover, a number of law review articles have failed to note the impact of *General Telephone*.²⁰⁵

We now turn to a circuit-by-circuit analysis of the cases applying (and in some cases ignoring) the *General Telephone* principles. We shall then analyze the meaning of identity of claims in specific contexts, including antitrust, mass torts, securities, contract, employment discrimination, and other civil rights cases.

VIII. CIRCUIT-BY-CIRCUIT ANALYSIS OF THE IMPACT OF *GENERAL TELEPHONE*

This circuit-by-circuit analysis is based on a sample of approximately seven hundred published federal class action opinions for the years 1982 through 1991.²⁰⁶ The results of the survey are organized by each of the twelve federal circuits. The following sections begin by dividing the circuit cases which have followed the identity of claims approach of *General Telephone* by topic areas.²⁰⁷ Most sections then include a more detailed discussion of a few select opinions that most closely followed or strayed from the *General Telephone* guidelines.

²⁰⁴ 4 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 24.24, 24.29 (2d ed. 1984).

²⁰⁵ See, e.g., Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 84 (1991) (defining adequacy without regard to identity of claims); George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 35-36 (1983); George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73, 132-61 (1984); Angelo N. Ancheta, Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 299-305 (1985); Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 620, 623-33 (1986).

²⁰⁶ The sample was drawn from listings in two *Shepard's United States Citations* publications. First, the sample includes all cases listed under *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), in *Shepard's United States Citations* 1984 through the December 1991 supplement. SHEPARD'S UNITED STATES CITATIONS (1984-supp. 1991). Second, the sample includes those cases listed under Rule 23(a)(3) and Rule 23(a)(4) in *Shepard's United States Citations* 1986 through 1990, including the December 1991 Supplement. SHEPARD'S UNITED STATES CITATIONS (1986-supp. 1991). This method was selected in an effort to create a sample that would be manageable for research purposes yet provide a representative picture of the law in this area.

²⁰⁷ Some of these cases include, as dicta, language which may be construed and applied contrary to *General Telephone*.

A. First Circuit

Federal courts within the First Circuit have followed the *General Telephone*²⁰⁸ standard in civil rights,²⁰⁹ securities,²¹⁰ and single-issue cases.²¹¹ The standard was closely followed in the recent case of *In re One Bancorp Securities Litigation*.²¹² The named plaintiffs in this securities fraud action sought to certify a class that included all purchasers of the defendant's publicly traded securities in a nineteen and one-half month period beginning in March 1988. The court began its consideration of the certification issue by quoting its general duty under *General Telephone* to certify a class only "if it is 'satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'"²¹³

²⁰⁸ 457 U.S. 147 (1982).

²⁰⁹ See *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131 (1st Cir. 1985) (racial discrimination in hiring action in which class was limited to applicants or applicants for transfer to same welding job as named plaintiff).

²¹⁰ See *In re One Bancorp Sec. Litig.*, 136 F.R.D. 526, 528 (D. Me. 1991) (restricting certified class to purchasers of common stock and refusing to allow named plaintiff who purchased stock through corporation of which he was president to represent class); *In re Bank of Boston Corp. Sec. Litig.*, 762 F. Supp. 1525, 1530 (D. Mass. 1991) (using standing analysis to eliminate from class of open market purchasers those who purchased after named plaintiff); *Adair v. Sorenson*, 134 F.R.D. 13, 16 (D. Mass. 1991) (using standing analysis to reject "common course of conduct" as sufficient to permit plaintiff to represent subsequent purchasers); cf. *Grace v. Perception Technology Corp.*, 128 F.R.D. 165, 169 (D. Mass. 1989) (holding access to unique information through personal contact with corporate offices and special meetings rendered two of four named plaintiffs atypical to class); *Tolan v. Computervision Corp.*, 696 F. Supp. 771, 774-77 (D. Mass. 1988) (certifying class that included purchasers of options as well as purchasers of common stock); *Randle v. Spectran*, 129 F.R.D. 386, 391 (D. Mass. 1988) (allowing named plaintiffs, who continued to purchase stock after company disclosure of losses, to represent earlier purchasers); *Gorsey v. I.M. Simon & Co.*, 121 F.R.D. 135, 138-39 (D. Mass. 1988) (differences in reliance did not defeat typicality); *Priest v. Zayre Corp.*, 118 F.R.D. 552, 556-57 (D. Mass. 1988) (holding class period covering release of different documents appropriate if the documents repeated the same misrepresentations as part of a single common course of conduct); *Kirby v. Cullinet Software, Inc.*, 116 F.R.D. 303, 308 (D. Mass. 1987) (holding allegation of "common course of conduct" allowed named plaintiffs to represent subsequent purchasers whose reliance was based on interrelated and cumulative misrepresentations during a limited three month period).

²¹¹ See *Tyler v. United States Dep't of Labor*, 752 F. Supp. 32, 44-45 (D. Me. 1990) (denying certification in challenge to interpretation of Trade Act of 1974 because same relief was obtainable through individual injunction or corresponding declaratory relief).

²¹² 136 F.R.D. 526 (D. Me. 1991).

²¹³ *Id.* at 528 (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)).

The court focused most of its attention on the typicality requirement of Rule 23(a)(3). It quickly rejected one of the proposed named plaintiffs because the stock purchases attributed to him actually were made by a corporation of which he was the president.²¹⁴ The court held that because the plaintiff "never purchased One Bancorp stock, his claims [were] not typical of those of the class."²¹⁵ The court used a similar rationale to exclude from the class those who purchased company securities other than common stock. The court held that because all of the named plaintiffs were purchasers only of common stock, their claims were atypical "of claims of persons who traded in One Bancorp securities other than common stock."²¹⁶

The court rejected, for the purposes of certification, a defense contention that differences in reliance between named plaintiffs and the proposed class rendered the claims atypical because the class and representatives all relied on the integrity of the artificially inflated market price.²¹⁷ The court also rejected a defense contention that the claims of the named representatives were atypical of at least part of the class because the named representatives purchased late in the class period and, therefore, did not properly represent earlier purchasers.²¹⁸ The court concluded that such differences did not render the claims of later purchasers atypical because the complaint was based on the theory that the defendants had "engaged in a scheme or common course of conduct designed to deceive the investing public,"²¹⁹ and the plaintiff pointed to specific and identified documents which contain interrelated and cumulative misrepresentations.²²⁰

B. *Second Circuit*

Federal courts within the Second Circuit have followed the *General Telephone*²²¹ standard in civil rights,²²² antitrust,²²³ securities,²²⁴ mass tort,²²⁵ constitutional law,²²⁶ bankruptcy,²²⁷ and single issue²²⁸ cases.

²¹⁴ *Id.* at 530.

²¹⁵ *Id.*

²¹⁶ *Id.* at 531-32.

²¹⁷ *Id.* at 530.

²¹⁸ *Id.* at 530-31.

²¹⁹ *Id.* at 531.

²²⁰ *Id.*

²²¹ 457 U.S. 147 (1982).

²²² See *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 596-600 (2d Cir. 1986) (holding typicality satisfied in sex discrimination action by showing that company used same subjective evaluation system for all members of the class and decisions made by "same central group of people"); see also *Glover v. Crestwood Lake Section 1 Holding Corps.*,

746 F. Supp. 301, 305-06 (S.D.N.Y. 1990) (certifying class in challenge to alleged discriminatory apartment rental policy because showing made that defendant discriminated against plaintiff using one established policy which discriminated against minorities); *Adames v. Mitsubishi Bank Ltd.*, 133 F.R.D. 82, 88-90 (E.D.N.Y. 1989) (limiting class of non-Asian and non-Japanese employees in discrimination claim to employees of New York office); *Ashe v. Board of Elections*, 124 F.R.D. 45, 48-49 (E.D.N.Y. 1989) (holding 11 named plaintiffs in voting rights action satisfied typicality because allegation was that they were discriminated against by series of acts which encompassed the class claims); *Strykers Bay Neighborhood Council, Inc. v. City of N.Y.*, 695 F. Supp. 1531, 1537 (S.D.N.Y. 1988) (holding alleged oral promises made to named representatives in action challenging urban renewal plan rendered their claims atypical because subject to unique defenses); *AFSCME v. Nassau County*, 664 F. Supp. 64, 67-68 (E.D.N.Y. 1987) (certifying class of female employees alleging discrimination because they were employed in "traditionally female jobs" because case involved one comprehensive plan and was not based on individual decisions in hiring and promotion); *Jane B. v. New York City Dep't of Social Servs.*, 117 F.R.D. 64, 70 (S.D.N.Y. 1987) (finding typicality in action by two juveniles broadly challenging conditions at two centers for adolescent girls with behavioral and emotional problems because conditions affected all members of class and were based on same legal theory); *Louis M. by Velma M. v. Ambach*, 113 F.R.D. 133, 137 (N.D.N.Y. 1986) (holding, in action to enforce provisions of the Education of the Handicapped Act, differences in individual factual circumstances did not affect central legal claim); *Selzer v. Board of Educ.*, 112 F.R.D. 176, 178-79 (S.D.N.Y. 1986) (finding typicality in action by female guidance counselors alleging sex discrimination in selection for administrative and supervisory jobs because affidavits supported their claim that they were discriminated against by the same central group of people "in same general fashion" as other female employees); *Avagliano v. Sumitomo Shoji America, Inc.*, 103 F.R.D. 562, 567, 573-77 (S.D.N.Y. 1984) (certifying class claiming discrimination in favor of Japanese males); *Moses v. Avco Corp.*, 97 F.R.D. 20, 23 (D. Conn. 1982) (declining to certify across-the-board employment discrimination case because named plaintiffs could not represent both union and nonunion class members); *Warren v. IIT World Communications, Inc.*, 95 F.R.D. 425, 429 (S.D.N.Y. 1982) (holding named representative in sex discrimination employment case could not represent class of those denied promotions because she never sought promotion); *Meyer v. Macmillan Publishing Co.*, 95 F.R.D. 411, 414-15 (S.D.N.Y. 1982) (allowing named plaintiffs complaining of sex discrimination in promotions to represent class that included applicants because affidavits provided "significant proof [of] . . . a general policy of discrimination' . . . [which] 'pervades' . . . all personnel decisions").

²²³ See *Vasiliow Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 345, 347-48 (E.D.N.Y. 1987) (certifying plaintiff class of independent beer wholesalers in the State of New York in horizontal price-fixing case based on system of exclusive territory contracts, but declining to certify plaintiff class in vertical price-fixing claim or to certify defendant class as either a vertical or a horizontal claim); *Uniondale Beer Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 340, 342-45 (E.D.N.Y. 1987) (certifying statewide plaintiff class of beer retailers in horizontal price-fixing case based on use of exclusive territory agreements but declining to

certify defendant class based on failure to show numerosity); *see also* *Rios v. Marshall*, 100 F.R.D. 395, 406 (S.D.N.Y. 1983) (limiting claims to those years in which named plaintiffs raised claims in action alleging conspiracy to replace citizen farmworkers).

²²⁴ *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (finding no abuse of discretion by district court in ruling that unique defenses against named plaintiff made class certification inappropriate); *Epifano v. Boardroom Business Prods., Inc.*, 130 F.R.D. 295, 299 (S.D.N.Y. 1990) (certifying purchaser of initial public offering as class representative when same alleged misrepresentation made to entire class through registration statement, prospectus, and press releases); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 455 (S.D.N.Y. 1989) (holding access to special information not privy to rest of class made claim by underwriter atypical to class because of differences in reliance); *see also Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989) (rejecting named representative because inside information made him subject to unique defenses regarding reliance); *Kamerman v. Steinberg*, 123 F.R.D. 66, 70 (S.D.N.Y. 1988) (certifying on reconsideration of earlier denial because of conflicts between class attorneys); *In re Boardwalk Marketplace Sec. Litig.*, 122 F.R.D. 4, 7 (D. Conn. 1988) (holding some factual differences in prospectus did not defeat typicality when each omitted the same material matters relating to financing and the promoters); *Bresson v. Thomson McKinnon Sec., Inc.*, 118 F.R.D. 339, 344 (S.D.N.Y. 1988) (finding typicality in case concerning sale of limited partnerships where communications to class members all contained the same omissions and half-truths); *Gruber v. Prudential-Bache Sec., Inc.*, 679 F. Supp. 165, 183 (D. Conn. 1987) (holding named plaintiff who purchased interest in partnership from third party could not represent class of investors who purchased interests in the same partnership directly from defendant); *Koenig v. Benson*, 117 F.R.D. 330, 339-40 (E.D.N.Y. 1987) (certifying later purchaser who acquired stock to represent earlier purchasers because the same misrepresentation was contained in both purchasers' annual reports); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 114 F.R.D. 48, 53 (S.D.N.Y. 1987) (holding variations in interest due or dates and amounts of redemption did not defeat typicality in action over misrepresentations in sale of trust bonds); *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986) (holding differences involving date, type, and manner of purchase, investor's perception of the transaction, or information furnished did not destroy typicality if named plaintiff was "victim of same material omissions and the same consistent course of conduct"); *Kamerman v. Steinberg*, 113 F.R.D. 511, 516 (S.D.N.Y. 1986) (rejecting two named plaintiffs because they were simultaneously pursuing derivative action creating conflict of interest); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 112 F.R.D. 383, 387 (S.D.N.Y. 1986) (holding certification of class that included tenderers of shares and purchasers of calls during tender period was proper because both were affected by same misrepresentations that artificially inflated the price of company securities); *Kamerman v. Ockap Corp.*, 112 F.R.D. 195, 197 (S.D.N.Y. 1986) (holding long-standing antagonism toward company rendered named representative atypical because subject to unique defenses); *Shankroff v. Advest, Inc.*, 112 F.R.D. 190, 194 (S.D.N.Y. 1986) (holding typicality satisfied because same omissions affected representative and the class); *Caleb & Co. v. E.I. DuPont de Nemours & Co.*, 110 F.R.D. 316, 318-19

(S.D.N.Y. 1986) (finding claim of failure to pay cash promptly after tender of stock constituted "common course of conduct" that satisfied typicality requirement); Michaels v. Ambassador Group Inc., 110 F.R.D. 84, 88-90 (E.D.N.Y. 1986) (holding conflicts between early and later purchasers did not defeat typicality because misrepresentations or omissions relied upon were interrelated and relied upon by the entire class); Klein v. A.G. Becker Paribas Inc., 109 F.R.D. 646, 652 (S.D.N.Y. 1986) (holding later purchasers could not represent earlier purchasers because disclosures rendered their claims atypical); Kronfeld v. Trans World Airlines, Inc., 104 F.R.D. 50, 54 (S.D.N.Y. 1984) (finding purchases by plaintiff after disclosure did not render claim atypical because materiality of alleged omissions is judged by objective, not subjective, standards and applied to entire class).

In some securities cases, however, the *General Telephone* standard has not been followed. See Garfinkel v. Memory Metals, 695 F. Supp. 1397, 1402-04 (D. Conn. 1988) (finding that a series of press releases that contained different alleged misrepresentations were a "common course of conduct" satisfying typicality); Tedesco v. Mishkin, 689 F. Supp. 1327 (S.D.N.Y. 1988) (certifying class of purchasers in investment vehicles over 15 year period even though each vehicle was different and not all plaintiffs invested in all vehicles).

²²⁵ See McKernan v. United Technologies Corp., 120 F.R.D. 452, 453 (D. Conn. 1988) (finding claims of named plaintiff who sold his helicopter not typical of those who still owned their helicopters in product liability action against manufacturer); see also *In re Joint E. & S. District Asbestos Litig.*, 129 B.R. 710, 819-20 (Bankr. E. & S.D.N.Y. 1991).

²²⁶ See Burka v. New York City Transit Auth., 121 F.R.D. 215, 217-18 (S.D.N.Y. 1988) (creating subclasses among employees who were challenging drug-testing program); see also Burka v. New York City Transit Auth., 110 F.R.D. 595, 601 (S.D.N.Y. 1986) (refusing to allow nonusers of marijuana to represent class that included users or vice versa).

²²⁷ See *In re Broadhollow Funding Corp.*, 66 B.R. 1005, 1007 (Bankr. E.D.N.Y. 1986) (certifying defendant class in action over ownership of mortgages only after creating subclass to represent different types of holdings).

²²⁸ See Devine v. Combustion Eng'g, Inc., 760 F. Supp. 989, 996 (D. Conn. 1991) (limiting class of participants in early retirement benefit plan to employees at single plant location because of differences in promises contained in documents distributed to employees at other locations); Goetz v. Crosson, 728 F. Supp. 995, 1004 (S.D.N.Y. 1990) (challenge by patients involuntarily retained at state psychiatric center to hearing procedure related to confinement); see also Sharif by Salahuddin v. New York State Educ. Dep't, 127 F.R.D. 84, 88-89 (S.D.N.Y. 1989) (holding differences in qualifications of named plaintiff did not defeat typicality in action by female high school students challenging use of Scholastic Aptitude Tests as sole basis for awards in state scholarship program); Luyando v. Bowen, 124 F.R.D. 52, 55 (S.D.N.Y. 1989) (certifying plaintiff and defendant classes in action challenging "pass through" policy in state welfare program application); Doe v. Coughlin, 697 F. Supp. 1234 (N.D.N.Y. 1988) (certifying, on court motion, class of inmates in state correction facilities challenging policy of transferring inmates who tested HIV positive); David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 756-57 (S.D.N.Y. 1988)

A sample decision within the Second Circuit which follows *General Telephone* on its facts but uses ambiguous language is *In re Energy Systems Equipment Leasing Securities Litigation*.²²⁹ In this case, investors alleging securities fraud and RICO violations sued multiple entities who were involved in offering lease and service agreements regarding energy conservation devices.²³⁰ The defendants allegedly prepared standardized and virtually identical offering materials and related documents that misled lessors/purchasers by way of misrepresentations and omissions.²³¹ On these facts, the representatives' claims fairly encompass the class claims, but the language of the opinion is far broader than the *General Telephone* standard. To illustrate, consider standards set by the *Energy Systems* court, including "factual differences will not defeat class certification where the various claims arise from the same legal theory"²³² and "[actual differences] have their

(finding typicality satisfied in copyright infringement action because there was a "congruence of interests" between named and unnamed plaintiffs in that they were asserting the identical legal issue); *Pension Benefit Guar. Corp. v. LTV Corp.*, 122 F.R.D. 436, 438-39 (S.D.N.Y. 1988) (holding retirees could represent class of plaintiffs that included present employees of company that terminated pension plan while in bankruptcy reorganization); *Lewis v. Gross*, 663 F. Supp. 1164, 1168 (E.D.N.Y. 1986) (finding challenge to Medicaid eligibility criteria by class of aliens met typicality requirement because claims of named plaintiffs and class "rest[ed] on identical legal theories"); *Follette v. Vitanza*, 658 F. Supp. 492, 504-09 (N.D.N.Y. 1986) (certifying plaintiff and defendant classes in challenge to state wage garnishment law); *Bruce v. Christian*, 113 F.R.D. 554, 558 (S.D.N.Y. 1986) (holding differences in evidence regarding residency did not defeat typicality in action challenging city housing authority tenancy termination policy); *DeAllaume v. Perales*, 110 F.R.D. 299, 305 (S.D.N.Y. 1986) (certifying plaintiff and defendant classes in action alleging state failure to properly adhere to regulations governing low income energy assistance program); *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233, 252 (S.D.N.Y. 1989) (challenge by low income tenants to policies when subsidies were suspended because of landlord's failure to make repairs); *Koster v. Perales*, 108 F.R.D. 46, 52 (E.D.N.Y. 1985) (holding typicality met in action seeking improved provision of emergency shelter because legal issues of named plaintiffs' claims were "central" to both their claims and those of other class members).

²²⁹ 642 F. Supp. 718 (E.D.N.Y. 1986). Because the opinion purports to and does follow *General Telephone* on its factual holding, it is classified as following *General Telephone*, notwithstanding its loose language.

²³⁰ *Id.* at 724.

²³¹ *Id.* at 730.

²³² *Id.* at 750.

genesis in the same alleged course of conduct.”²³³ These standards, applied alone, may lead to results contrary to *General Telephone*.²³⁴

C. Third Circuit

Federal courts within the Third Circuit have generally followed the *General Telephone*²³⁵ standard in civil rights,²³⁶ antitrust,²³⁷ securities,²³⁸

²³³ *Id.*

²³⁴ The court in *In re Lilco Securities Litigation*, 111 F.R.D. 663 (E.D.N.Y. 1986), similarly uses such broad language. On the alleged facts, the defendants, in order to sell stock, failed to disclose or misrepresented the cost, completion date, and management of a nuclear facility as well as misrepresenting need, income, and operating profit projections. *Id.* at 664–67. Differences in reliance were rejected as largely irrelevant because the court presumed reliance. *Id.* at 668. The court then declared that “class certification should not be denied because the common course of conduct included . . . different activities . . . or there were multiple disclosures by defendants . . .” *Id.* at 669.

²³⁵ 457 U.S. 147 (1982).

²³⁶ See *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122–25 (3d Cir. 1985) (narrowing class to eliminate claim of discrimination in initial assignment because statute of limitations barred such complaints by named plaintiffs); see also *Taylor v. White*, 132 F.R.D. 636, 647–48 (E.D. Pa. 1990) (certifying class attack on general policy of discrimination against Medicaid patients in nursing home assignments although the particular injuries differed); *Vargas v. Calabrese*, 634 F. Supp. 910, 919 (D.N.J. 1986) (holding differing factual circumstances did not defeat typicality in suit alleging elections violations because of claim that instructions promulgated by board of elections encouraged harassment of minority voters); *Wilmington Firefighters Local 1590 v. City of Wilmington*, 109 F.R.D. 89, 91 (D. Del. 1985) (finding typicality satisfied in reverse discrimination suit because all applicants for promotion were subject to same testing procedures); *Ladele v. Consolidated Rail Corp.*, 95 F.R.D. 198, 200–04 (E.D. Pa. 1982) (rejecting certification of across-the-board class in employment discrimination action because named plaintiff, a former employee, could not represent rejected applicants).

²³⁷ See *Weiss v. York Hosp.*, 745 F.2d 786, 810–11 (3d Cir. 1984) (holding plaintiff who was denied staff privileges by hospital could represent class that included osteopaths who did not apply because all were part of class of “intended victims” of hospital’s discriminatory policy); *Cumberland Farms, Inc. v. Browning-Ferris Indus.*, 120 F.R.D. 642, 645 (E.D. Pa. 1988) (finding typicality satisfied in claim of horizontal price-fixing in containerized garbage disposal industry because it operated on a standardized nationwide basis); *In re Chlorine & Caustic Soda Antitrust Litig.*, 116 F.R.D. 622, 625 (E.D. Pa. 1987) (holding typicality satisfied in horizontal price-fixing case because named plaintiffs had to prove same elements as the class in establishing a conspiracy, its effectuation, and resulting damages).

²³⁸ See *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 372–73 (D. Del. 1990) (allowing call option purchaser to represent class that included common stock purchasers

mass tort,²³⁹ RICO,²⁴⁰ labor law,²⁴¹ contract,²⁴² and single issue²⁴³ cases. In some instances, however, the standard has been disregarded.²⁴⁴

because both relied on fraud-on-the-market theory); *see also* Moskowitz v. Lopp, 128 F.R.D. 624, 628 (E.D. Pa. 1989) (holding typicality satisfied even though named plaintiff was a takeover arbitrageur who was alleged not to have relied on integrity of market); *In re* Bexar County Health Facility Dev. Corp. Sec. Litig., 125 F.R.D. 625, 628 (E.D. Pa. 1989) (finding typicality satisfied in class of original purchasers of bonds because alleged material misrepresentations and omissions were contained in offering statement); *In re* IGI Sec. Litig., 122 F.R.D. 451, 456 (D.N.J. 1988) (focus of typicality inquiry in securities case on defendant's, not plaintiff's, behavior); *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 122 F.R.D. 177, 180-81 (E.D. Pa. 1988) (holding uniform statements in offering circulars satisfied typicality in case alleging excessive and unconscionable markups of bond sales); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 121 F.R.D. 642, 647-48 (M.D. Pa. 1988) (finding reliance on news reports did not defeat typicality in case alleging misleading proxy statements in connection with merger); *In re* Western Union Sec. Litig., 120 F.R.D. 629, 634 (D.N.J. 1988) (holding alleged reliance on uniform public statements satisfied typicality requirement); *In re* ORFA Sec. Litig., 654 F. Supp. 1449, 1460-61 (D.N.J. 1987) (finding typicality satisfied because claims of fraud and misrepresentation were based on same series of reports and news releases); *Snider v. Upjohn Co.*, 115 F.R.D. 536, 538 (E.D. Pa. 1987) (holding typicality satisfied because misrepresentations and omissions were contained in public statements common to class); *Gavron v. Blinder Robinson & Co.*, 115 F.R.D. 318, 323 (E.D. Pa. 1987) (holding defendant's claim that named plaintiff relied on oral communications of broker did not defeat typicality in claim based on fraud-on-the-market theory); *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, 447-48 (E.D. Pa. 1985) (holding failure to show reliance on standardized oral or written misrepresentations defeated typicality); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 887-88 (D.N.J. 1984) (finding typicality lacking in claim based on oral misrepresentations because of lack of proof of "essentially identical communications" to other class members); *Zeffiro v. First Pa. Banking & Trust*, 96 F.R.D. 567, 569-70 (E.D. Pa. 1983) (upholding typicality when alleged defense affected ultimate right to recover).

²³⁹ *See* *Sala v. National R.R. Passenger Corp.*, 120 F.R.D. 494, 495 (E.D. Pa. 1988) (certifying class of train accident victims; typicality was satisfied though damage issues would differ); *see also In re Fleet*, 76 B.R. 1001, 1008-09 (Bankr. E.D. Pa. 1987) (certifying debtor class allegedly subject to same unfair or deceptive acts of bankruptcy service company; typicality was not contested); *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 427-30 (E.D. Pa. 1984) (certifying nationwide class of public and private school districts because named plaintiffs' claims were sufficiently coextensive with those of the class to insure full, fair, and vigorous prosecution).

²⁴⁰ *See* *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32, 35-36 (E.D. Pa. 1985) (holding former tenant and tenant who signed lease after shopping mall opened could represent all former and current tenants in action alleging misrepresentations by mall owners because same alleged misrepresentations made to all tenants).

²⁴¹ See *McClendon v. Continental Group, Inc.*, 113 F.R.D. 39, 42 (D.N.J. 1986) (certifying nationwide class in action alleging layoffs to cut pension liability because rules regarding plan were the same at all company plants).

²⁴² See *Coca-Cola Bottling Co. v. Coca-Cola*, 98 F.R.D. 254, 266-68 (D. Del. 1983) (holding that differences in state law defeated typicality in claims alleging breach of contract but not claims involving interpretation of terms of consent decrees); see also *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1128 (D.N.J. 1989) (class allegations that defendant extorted confessions and payments lacked commonality and typicality); cf. *Perez v. Government of Virgin. Is.*, 109 F.R.D. 384, 387 (D.V.I. 1986) (various policy holders and those with claims against holder suing government concerning a collapsed insurance company; court held no common or typical issues).

²⁴³ See *Grant v. Sullivan*, 131 F.R.D. 436, 447 (M.D. Pa. 1990) (holding claims of class "encompassed" within named plaintiff's claim in action to reverse decisions because of bias of administrative law judge); *Safran v. United Steelworkers*, 132 F.R.D. 397, 402 (W.D. Pa. 1989) (holding seniority status of named representatives did not defeat typicality in action charging violation of collective bargaining agreements regarding contracting work because all plaintiffs had interest in proving violation; however, typicality defeated in claim that named plaintiffs were deprived certain retirement benefits because representatives did not stand in identical position to all members of class); *Hohe v. Casey*, 128 F.R.D. 68, 70 (M.D. Pa. 1989) (holding, in action by nonunion state employees challenging "fair share" union fee arrangement, typicality satisfied because all plaintiffs represented regardless of whether they objected to fee deduction); *Roe v. Operation Rescue*, 123 F.R.D. 500, 503 (E.D. Pa. 1988) (injunction sought to prevent interference with those performing or seeking abortions during protest by antiabortion group); *Lloyd v. City of Philadelphia*, 121 F.R.D. 246, 249 (E.D. Pa. 1988) (narrowing class to include only those employees who objected to practice in action challenging compulsory union membership of city employees); *In re Whittaker*, 84 B.R. 934, 939 (Bankr. E.D. Pa. 1988) (certifying class of debtors whose electric service was terminated prior to bankruptcy filing and not restored after filing); *Troutman v. Cohen*, 661 F. Supp. 802, 810 (E.D. Pa. 1987) (finding individual circumstances did not defeat typicality in action challenging state administrative hearing process for determining level of required nursing care); *Cristiano v. Courts of the Justices of the Peace*, 115 F.R.D. 240, 248 (D. Del. 1987) (holding that admission by named plaintiff of validity of her debt did not defeat typicality in action by union members challenging state wage attachment statute); *Malloy v. Eichler*, 628 F. Supp. 582, 589 (D. Del. 1986) (allowing siblings in action alleging violations of Medicaid Act, to represent class that included siblings and grandparents because each group relied on same legal arguments); *Kromnick v. State Farm*, 112 F.R.D. 124, 127 (E.D. Pa. 1986) (finding named plaintiffs typical in challenge to insurance company's failure to pay postmortem work loss benefits under state no-fault act because interests of class coincided); *Ortiz v. Eichler*, 616 F. Supp. 1046, 1056-57 (D. Del. 1985) (permitting recipients to represent class that included applicants in challenge to state procedures for administration of three federal public assistance programs because all subject to same hearing procedures); *Paskel v. Heckler*, 99 F.R.D. 80, 83 (E.D. Pa. 1983) (holding that, in action challenging termination of disability

D. Fourth Circuit

Federal courts within the Fourth Circuit have followed the *General Telephone*²⁴⁵ standard in civil rights,²⁴⁶ antitrust,²⁴⁷ securities,²⁴⁸ mass tort,²⁴⁹

benefits, the "typicality prerequisite guarantees that the class representative's claim fairly encompasses the issues common to the class").

²⁴⁴ See *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988) (certifying class of inmates making broad complaint about state prison conditions even though not all named plaintiffs were subject to all conditions alleged in complaint); *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225, 227 (E.D. Pa. 1991) (determining that typicality was not a stringent requirement); *Angelastro v. Prudential-Bache Sec., Inc.*, 113 F.R.D. 579, 582-83 (D.N.J. 1986) (finding typicality but refusing to certify under (b)(3) because atypical issues predominated); *Shamberg v. Ahlstrom*, 111 F.R.D. 689, 695-97 (D.N.J. 1986) (certifying class that included later purchasers despite allegations of different misrepresentations and nondisclosures because all potential members were part of a common scheme to defraud); see also *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 129-30 (3d Cir. 1987) (certifying class of union workers alleging federal law violations against their union because claims were part of a "single course of conduct," even though named plaintiffs did not share all of the claims of the class).

²⁴⁵ 457 U.S. 147 (1982).

²⁴⁶ See *Holsey v. Armour & Co.*, 743 F.2d 199, 215-16 (4th Cir. 1984) (restricting class of office and management employees to sales and supervisory positions because wider class "encompassed" jobs for which no evidence was presented); *Adams v. Bethlehem Steel Corp.*, 736 F.2d 992, 994 (4th Cir. 1984) (refusing to certify broad class in employment discrimination case based on "mere existence" theory of class-wide harm); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 332-34 (4th Cir. 1983) (allowing class to include those discriminated against in promotion only after intervention by named representatives who claimed to have been subject to such discrimination); cf. *Bennett v. Westfall*, 640 F. Supp. 169, 170 (S.D.W. Va. 1986) (declining to certify former prisoner to represent class of current jail inmates challenging conditions); *Price v. Cannon Mills*, 113 F.R.D. 66, 68 (M.D.N.C. 1986) (holding failure to show class harmed in same way as plaintiff in sex discrimination action rendered claim atypical); *Harris v. Marsh*, 100 F.R.D. 315, 321-24 (E.D.N.C. 1983) (holding statistical evidence showing African-American employees promoted in numbers in proportion to number in work force defeated typicality).

²⁴⁷ See *Butt v. Allegheny Pepsi-Cola Bottling Co.*, 116 F.R.D. 486, 490 (E.D. Va. 1987) (holding that evidence that some defendants might have varied from alleged price-fixing conspiracy in dealings with some class members defeated typicality).

²⁴⁸ See *Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112, 1118 (4th Cir. 1989) (holding district court's denial of certification because named plaintiff voted against merger was error as a matter of law because reliance is not an element of proxy fraud claim).

²⁴⁹ See *Plotkin v. Association of Eye Care Centers, Inc.*, 710 F. Supp. 156, 160 (E.D.N.C. 1989) (finding no typicality because plaintiffs did not present evidence that other members of class were victims of misrepresentation or bad faith); *In re Johnson*, 80 B.R.

constitutional law,²⁵⁰ labor law,²⁵¹ and single issue²⁵² cases. Some civil rights²⁵³ and mass tort²⁵⁴ cases, however, have not followed *General Telephone*.

791, 796 (Bankr. E.D. Va. 1987) (finding typicality in claim against trustee of alleged pyramid scheme operator because all asserted a single claim that the funds held by the trustee were not part of the bankruptcy estate).

²⁵⁰ See *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 305 (4th Cir. 1991) (holding a lack of injury by named plaintiffs in dispute over union use of union dues rendered them atypical of potential class members who might have suffered injury); *Stott v. Haworth*, 916 F.2d 134, 143 (4th Cir. 1990) (overruling district court grant of certification because no typicality in case of state employees who alleged improper partisan political concerns impacted employment decisions); *Irby v. Fitz-Hugh*, 693 F. Supp. 424, 431 (E.D. Va. 1988) (declining to certify statewide class in challenge to statute allowing appointed rather than elected school commissions because not all school districts had significant black populations that might be subject to discrimination); *Brooks v. Ward*, 97 F.R.D. 529, 533 (W.D.N.C. 1983) (holding action challenging conditions in 12 prisons need not have named representatives from each prison because complaints about the facilities arose out of the common design of all 12 facilities, and the challenged administrative procedures were uniform).

²⁵¹ See *Phillips v. Brock*, 652 F. Supp. 1372, 1378-79 (D. Md. 1987) (holding action challenging housing provisions for farm workers' class limited to commuter workers because plaintiffs were commuters); *Haywood v. Barnes*, 109 F.R.D. 568, 575 (E.D.N.C. 1986) (finding substantial similarity of facts satisfied typicality in case alleging violations of farm workers' rights in substandard housing, unitemized pay statements, and failure to keep required records of payroll deductions).

²⁵² See *Forest Hills Early Learning Ctr., Inc., v. Lukhard*, 661 F. Supp. 300, 307 (E.D. Va. 1987) (certifying defendant class in action challenging exemption of church day care centers from state licensing requirement because constitutional claims and defenses typical for class); *Jordan v. Lyng*, 659 F. Supp. 1403 (E.D. Va. 1987) (action challenging inclusion of income from some types of educational loans in determining eligibility for food stamps); *George v. Baltimore City Pub. Sch.*, 117 F.R.D. 368, 370 (D. Md. 1987) (holding plaintiffs represented by right-to-work group that required them to sign retainer and disclosure agreements were not rendered atypical because group was a bona fide independent legal aid organization); *Lester v. Lukhard*, 622 F. Supp. 316, 318 (W.D. Va. 1985) (stating plaintiff could not represent class challenging state procedure for determining eligibility for disability benefits because her case was certified for payments).

²⁵³ See *Brown v. Eckerd Drugs, Inc.*, 564 F. Supp. 1440, 1443-46 (W.D.N.C. 1983) (certifying broad class of black employees in discrimination suit because, although injuries were different, all were results of "subjective" decisionmaking process of "overwhelmingly white management/supervisory . . . force").

²⁵⁴ See *In re A.H. Robins Co.*, 880 F.2d 709, 727 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989). In *Robins*, the representative claim was that Aetna, the products liability insurer, was a joint tortfeasor by reason of its conduct. 880 F.2d at 710. This claim depended in part upon an analysis of common facts that would not vary in individual cases.

E. Fifth Circuit

Federal courts within the Fifth Circuit have followed the *General Telephone*²⁵⁵ standard in civil rights,²⁵⁶ securities,²⁵⁷ mass tort,²⁵⁸

In approving a mandatory (non-opt out) settlement, the court noted that, in light of the magnitude of the problem and the need for innovative approaches, it found no abuse of the trial court's discretion to certify. *Id.* at 752.

²⁵⁵ 457 U.S. 147 (1982).

²⁵⁶ See *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 906 (5th Cir. 1987) (holding plaintiff whose individual claims were found groundless could not represent class); *Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986) (holding tenure decisions turned on unique facts not typical to any one member of class); *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 795 (5th Cir. 1986) (deeming common class treatment inappropriate because of differences in methods of statistical proof used in proving applicant and promotion discrimination); *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1198-99 (5th Cir. 1984) (holding reliance on general policy of discrimination exception misplaced because defendant relied on two "objective inputs" in making hiring decisions); *Richardson v. Byrd*, 709 F.2d 1016, 1019-20 (5th Cir. 1983) (allowing female employee to represent class that included employee applicants because same alleged discriminatory policy that restricted transfer opportunities limited hiring decisions); *Fleming v. Travenol Lab., Inc.*, 707 F.2d 829, 832-33 (5th Cir. 1983) (holding a hired female plaintiff in sex discrimination case could not represent class that included applicants for employment, transfer, and promotion because she had no claim in those areas); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 616-17 (5th Cir. 1983) (allowing hourly employees to represent class that included salaried employees in race and sex discrimination action because discrimination based on university-wide "channeling policy"); *Wheeler v. City of Columbus*, 703 F.2d 853, 854-55 (5th Cir. 1983) (denying certification to across-the-board class when plaintiff only alleged discrimination in its widest sense); *Everitt v. City of Marshall*, 703 F.2d 207, 210-11 (5th Cir. 1983) (holding plaintiff in employment discrimination case could not represent class that included claims in recruiting, hiring, promotion, job assignment, or compensation because plaintiff was not subject to discrimination in those areas); *Anderson v. Douglas & Lomason Co.*, 122 F.R.D. 502, 506 (N.D. Miss. 1988) (certifying class of those denied applications for employment because representatives alleged systematic policy of refusing to give job applications to blacks); *Shafer v. Commander, Army & Air Force Exch. Serv.*, 667 F. Supp. 414, 432 (N.D. Tex. 1985) (limiting class to promotion and job assignment claims and allowing broad challenge to "mobility policy" because it had same effect on all female employees); *Young v. Pierce*, 628 F. Supp. 1037, 1041-42 (E.D. Tex. 1985) (holding HUD discrimination in federal housing program constituted "single-uniform policy" of supporting segregated housing); *Ivy v. Meridian Coca-Cola Bottling Co.*, 108 F.R.D. 118, 122 (S.D. Miss. 1985) (holding typicality satisfied if one general policy of alleged discrimination is manifested through an "entirely subjective decision-making process" with ultimate review by the president and secretary-treasurer); *Fischer v. Dallas Fed. Sav. & Loan*, 106 F.R.D. 465, 470-73 (N.D.

constitutional law,²⁵⁹ labor law,²⁶⁰ and immigration law cases.²⁶¹ In some cases, however, the *General Telephone* standard has not been followed.²⁶²

F. Sixth Circuit

Federal courts within the Sixth Circuit have followed *General Telephone*²⁶³ in civil rights,²⁶⁴ securities,²⁶⁵ antitrust,²⁶⁶ single issue,²⁶⁷ mass tort,²⁶⁸ breach of contract,²⁶⁹ and various other cases.²⁷⁰

Tex. 1985) (holding claims of named plaintiffs encompassed claims of class because all were denied residential loan in minority area).

²⁵⁷ See *Shivangi v. Dean Witter Reynolds, Inc.*, 107 F.R.D. 313, 324 (S.D. Miss. 1985) (holding case based on oral misrepresentations inappropriate for class treatment because of individual nature of communication).

²⁵⁸ See *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985). In *Jenkins*, all personal injury asbestos cases in the district were certified because the degree of harm would not defeat typicality as long as the harms were of the same type. A special master was appointed to determine disparity between representative and class claims. *Id.* at 272.

²⁵⁹ See *Dallas Gay Alliance, Inc., v. Dallas City Hosp. Dist.*, 719 F. Supp. 1380, 1391-92 (N.D. Tex. 1989) (denying certification based on theory that claims were but "examples" of discrimination to be proved at trial after claims of named plaintiff in action challenging care for AIDS patients were rendered moot because of changes in hospital policy); *K v. Complaints Comm. of Miss. State Bar*, 618 F. Supp. 307, 313 (S.D. Miss. 1985) (finding individual nature of bar complaint procedure rendered claim atypical of other potential class members).

²⁶⁰ See *Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir. 1986) (holding, in action challenging employment promises made to farm workers, class could include crew leaders and workers because predominant liability questions were common to the class).

²⁶¹ See *Doe I v. Meese*, 690 F. Supp. 1572, 1574 (S.D. Tex. 1988) (declining to certify class of all persons seeking political asylum but denied work permits because determinations handled on case-by-case basis rendered typicality impossible).

²⁶² See *Young v. Pierce*, 822 F.2d 1368, 1370 (5th Cir. 1987) (declining to rule on "scope" of class because parties resolved issue by agreement); *International Union, United Auto., Aerospace & Agric. Implement Workers v. LTV Aerospace & Defense Co.*, 136 F.R.D. 113, 120-25 (N.D. Tex. 1991) (allowing male dominated union to represent class of female employees for some claims in sex discrimination case); see also *Longden v. Sunderman*, 123 F.R.D. 547, 552 (N.D. Tex. 1988) (certifying class that included 4,000 investors in 121 limited partnerships over five years because of "high incidence of similarly misleading financial information common throughout all of the [offerings]").

²⁶³ 457 U.S. 147 (1982).

²⁶⁴ See *Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1012-13 (W.D. Mich. 1987) (using subclasses, each being represented, to assure that three claims of agricultural workers were adequately represented); *Knop v. Johnson*, 667 F. Supp. 467, 500 (W.D. Mich. 1987) (rejecting single class certification because interests of black and

white inmates regarding affirmative action program diverged); *Rosenberg v. University of Cincinnati*, 654 F. Supp. 774, 776-77 (S.D. Ohio 1986) (holding that without centralized decisionmaking, university-wide sex discrimination case was not certifiable); *Huguley v. General Motors Corp.*, 638 F. Supp. 1301, 1302-03 (E.D. Mich. 1986) (holding varying factual circumstances among class members would not defeat typicality if all complained of the discriminatory effect of same employee performance appraisal system); *Ramirez v. Webb*, 102 F.R.D. 968, 970 (W.D. Mich. 1984) (using multitude of representatives to challenge various acts by law enforcement resulting in harassment of individuals of Hispanic appearance).

²⁶⁵ See *Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 612-13 (E.D. Mich. 1985) (five subclasses used, each encompassing purchasers pursuant to a different misrepresentation).

²⁶⁶ See *Thompson v. Midwest Found. Indep. Physicians Ass'n*, 117 F.R.D. 108, 111 (S.D. Ohio 1987) (finding typicality for the federal claims of physicians under contract with defendant because policies and practices were the same on a class-wide basis; refusing to certify pendent state claims because of individualized issues of fact and law); see also *Jackshaw Pontiac, Inc., v. Cleveland Press Publishing Co.*, 102 F.R.D. 183, 189 (N.D. Ohio 1984) (advertisers sued newspapers for creating a monopoly; certification denied because named representatives used only several of the over 100 advertising rates allegedly increased by the violation and members of the class suffered different injuries).

²⁶⁷ See *Gould v. Sullivan*, 131 F.R.D. 108, 114 (S.D. Ohio 1989) (challenge to inclusion of AFDC benefits in computation of Supplemental Security Income benefits when former would terminate upon receipt of latter); *Maenner v. St. Paul Fire & Marine Ins. Co.*, 127 F.R.D. 488, 490 (W.D. Mich. 1989) (question of theft coverage for numerous ranchers in same cattle leasing program); see also *Knisley v. Bowman*, 656 F. Supp. 1540, 1543-44 (W.D. Mich. 1987) (limiting class to those taxpayers referred to tax refund intercept program); *Cottrell v. Lopeman*, 119 F.R.D. 651, 654 (S.D. Ohio 1987) (holding that denial of access to files of unemployment board amounted to a due process violation); *Akron Center for Reproductive Health v. Rosen*, 110 F.R.D. 576, 581 (N.D. Ohio 1986) (allowing certification of defendant class of city attorneys and prosecutors to enforce remedies after finding abortion statute unconstitutional); *Holden v. Heckler*, 584 F. Supp. 463, 487-88 (N.D. Ohio 1984) (discontinuation of social security without adequate procedural protections).

²⁶⁸ See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) (allowing personal injury and property liability claims in class action on behalf of residents living near corporation's chemical waste burial site; individual damage claims tried separately).

²⁶⁹ See *Thonen v. McNeil-Akron, Inc.*, 661 F. Supp. 1271, 1273-74 (N.D. Ohio 1986) (limiting class and excluding plaintiffs who had not signed accord and satisfaction agreements altering health coverage during retirement).

²⁷⁰ See *Reid v. White Motor Corp.*, 886 F.2d 1462, 1471 (6th Cir. 1989) (denying certification because representative was not a member of purported class but a representing attorney); *Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583 (S.D. Ohio 1987) (certifying defendant class of partners in accounting firm who prepared fraudulent audits);

G. Seventh Circuit

The courts of the Seventh Circuit have, with few exceptions, followed *General Telephone*²⁷¹ in civil rights,²⁷² securities,²⁷³ antitrust,²⁷⁴ single

Samuels v. Heckler, 668 F. Supp. 656, 665-66 (W.D. Tenn. 1986) (challenging types of conduct utilized by state agency in qualifying social security and disability payments; multiple representatives used to encompass all allegations).

²⁷¹ 457 U.S. 147 (1982).

²⁷² See *Majeske v. City of Chicago*, 740 F. Supp. 1350, 1357 (N.D. Ill. 1990) (limiting class to white officers or creating subclasses to protect all interests involved before certifying reverse discrimination case); *Talley v. Leo J. Shapiro & Assocs.*, 713 F. Supp. 254, 257 (N.D. Ill. 1989) (limiting employment discrimination claims by employees to those actually hired and excluding applicants not actually employed); *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 622-23 (N.D. Ill. 1989) (certifying claims of sexual discrimination and pervasive sexual harassment in national class of management employees relying on standard operating procedures as a general policy; focus was on disparate impact and statistical proof); *Harris v. General Dev. Corp.*, 127 F.R.D. 655, 659-60 (N.D. Ill. 1987) (limiting class to job applicants who actually applied and were rejected because all applicants were not typical of those discouraged from applying); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62-64 (N.D. Ill. 1986) (finding typicality in securities fraud action despite possible varying oral representations to class members and possible unique defenses because the "heart of the complaint" was the private placement memorandum); *Berggren v. Sunbeam Corp.*, 108 F.R.D. 410, 411 (N.D. Ill. 1985) (no showing to meet burden of typicality by female outside salespersons); *Oxman v. WLS-TV*, 595 F. Supp. 557, 561 (N.D. Ill. 1984) (raising concern over ability of a white person with Jewish heritage to be adequate representative for African Americans allegedly discriminated against based on race); *Minority Police Officers Ass'n v. City of South Bend*, 555 F. Supp. 921, 925 (N.D. Ind. 1983) (refusing to certify claims of proposed class because of vagueness and lack of injury to representatives); *Lawson v. Metropolitan Sanitary Dist.*, 102 F.R.D. 783, 791-92 (N.D. Ill. 1983) (limiting class to persons who experienced enumerated types of employment discrimination during preceding five years); *Rosario v. Cook County*, 101 F.R.D. 659, 661-63 (N.D. Ill. 1983) (holding representatives who alleged discrimination in promotion could not represent those deterred from applying); *Allen v. Isaac*, 99 F.R.D. 45, 52-55 (N.D. Ill. 1983) (class claims based on FDIC's disparate examination used for advancement; class limited to those actually taking the exam and receiving unsatisfactory marks, not those "chilled" from taking the examination).

²⁷³ See *Fry v. UAL Corp.*, 136 F.R.D. 626, 631-34 (N.D. Ill. 1991) (allowing two professional investors to represent class of all investors in stock, despite allegations of nonreliance on the market and sophistication disparity); *In re VMS Sec. Litig.*, 136 F.R.D. 466 (N.D. Ill. 1991) (using subclasses of purchasers in public offering and purchasers from market); *Kaplan v. Pomerantz*, 131 F.R.D. 118, 126-27 (N.D. Ill. 1990) (allowing executor of purchaser to represent class of those defrauded by offering materials, but executor could not represent direct purchasers because decedent purchased from market);

issue,²⁷⁵ mass tort,²⁷⁶ breach of contract,²⁷⁷ constitutional law,²⁷⁸ and various other cases.²⁷⁹

Harman v. LyphoMed, Inc., 122 F.R.D. 522, 527-28 (N.D. Ill. 1988) (deeming representative who purchased stock after partial disclosure typical with all purchasers denied full disclosure); Katz v. Comdisco, Inc., 117 F.R.D. 403, 407-08 (N.D. Ill. 1987) (holding that one representative sold more shares than he purchased during period of nondisclosure and was, therefore, not typical); Goldwater v. Alston & Bird, 116 F.R.D. 342, 347-48 (S.D. Ill. 1987) (holding unique defenses such as nonreliance on market and disregard of offering materials not to defeat typicality); Grossman v. Waste Management, Inc., 100 F.R.D. 781, 788 (N.D. Ill. 1984) (holding unique defenses such as being a sophisticated investor or reliance on third-party sources did not defeat typicality in securities fraud case); McNichols v. Loeb Rhoades & Co., 97 F.R.D. 331, 334-35 (N.D. Ill. 1982) (holding critical unique defenses to both representatives defeated by typicality and prevented adequate representation).

²⁷⁴ See United Nat'l Records, Inc. v. MCA, Inc., 99 F.R.D. 178, 180-82 (N.D. Ill. 1983) (effectively utilized two subclasses to deal with differing burdens of proof for groups of purchasers).

²⁷⁵ See Doe v. Reivitz, 830 F.2d 1441 (7th Cir. 1987) (denying AFDC benefits to children whose parents were illegal aliens maintainable as class action); Evans v. City of Chicago, 689 F.2d 1286, 1292-93 (7th Cir. 1982) (holding assignees of judgments against city had interests and defenses sufficiently different from judgment creditors to preclude certification); Bennett v. Tucker, 127 F.R.D. 501 (N.D. Ill. 1989) (due process challenge to state agency's failure to properly pursue claims that necessarily prevented wronged plaintiffs from recovery), *aff'd*, 956 F.2d 138 (7th Cir. 1992); Jones v. Bowen, 121 F.R.D. 344 (N.D. Ill. 1988) (challenge to denial of Social Security numbers or cards without procedural protections); Gomez v. Illinois State Bd. of Educ., 117 F.R.D. 394 (N.D. Ill. 1987) (challenge to state's failure to establish procedures to identify and accommodate school children with limited English proficiency); Ragsdale v. Turnock, 625 F. Supp. 1212 (N.D. Ill. 1985) (certifying a constitutional challenge to state restrictions on abortions brought by a class of doctors and a class of women against a class of state's attorneys), *aff'd in part, vacated in part*, 841 F.2d 1358 (7th Cir. 1988); Marcus v. Heckler, 620 F. Supp. 1218 (N.D. Ill. 1985) (challenging state's failure to seek medical equivalence findings with regard to qualification for certain entitlement programs); Lewis v. Tully, 96 F.R.D. 370 (N.D. Ill. 1982) (challenging practice of retaining discharged prisoner for return to central jail before release).

²⁷⁶ See Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (refusing to approve settlement, noting conflict between those seeking to liberalize benefit qualifications and those who were unrepresented and sought only to recover for negligent asset management; both groups were originally certified as a single class).

²⁷⁷ See Jeannides v. United States Home, 114 F.R.D. 29, 30 (N.D. Ill. 1987) (holding breach of contract to construct home too individual and atypical to authorize class certification); Wucsina v. Reliance Elec. Co., 129 F.R.D. 164, 168-69 (N.D. Ind. 1986) (holding different dates of layoff precluded class treatment because each required a separate interpretation of the collective bargaining agreement and alleged breaches therein).

An understandable, but unfortunate, failure to apply the *General Telephone* standard occurred in *De La Fuente v. Stokely-Van Camp, Inc.*²⁸⁰ In *De La Fuente*, a group of migrant farm workers brought suit under the Farm Labor Contractor Registration Act.²⁸¹ The farm workers alleged that the defendant failed to comply with several recruiting and disclosure requirements concerning the terms and conditions of employment.²⁸² The Act also required that the defendant obtain insurance and maintain payroll records.²⁸³ The court, in a sweeping generality, declared:

"A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." . . . The typicality requirement may be satisfied even if there are factual distinctions Thus, similarity of legal theory may control even in the face of differences of fact.²⁸⁴

Applying these broad standards, the court did not compare the violations alleged by the representatives and the violations suffered by the class.²⁸⁵ The result was a judgment that precluded recovery for the class on all other violations of the Act. The class was not protected because the violations against it were not encompassed within the representatives' claims.²⁸⁶

²⁷⁸ See *Wrightsell v. City of Chicago*, 678 F.Supp. 727, 734 (N.D. Ill. 1988) (deeming suspended or fired officers not typical of employed officers in dispute over constitutionality of drug testing).

²⁷⁹ See *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989) (refusing to certify due to conflict of motivation between two subparts of proposed class); *Coe v. National Safety Assocs., Inc.*, 134 F.R.D. 235, 238 (N.D. Ill. 1991) (finding typicality in class challenge to pyramid scheme, excluding only high level participants or those who made a profit); *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 676 (N.D. Ill. 1989) (finding typicality in credit fraud class action based on identical contract provisions and deletions); *Merk v. Jewel Food Stores*, 702 F. Supp. 1391, 1394-95 (N.D. Ill. 1988) (allowing representatives hired before lowering of wages and breach of contract to represent class including those hired after the breach); *United Indep. Flight Officers v. United Air Lines, Inc.*, 572 F. Supp. 1494, 1499 (N.D. Ill. 1983) (denying certification because of conflict of interest within proposed class of airline pilots suing on pension rights).

²⁸⁰ 713 F.2d 225 (7th Cir. 1983).

²⁸¹ *Id.* at 229.

²⁸² *Id.* at 231.

²⁸³ *Id.* at 230.

²⁸⁴ *Id.* at 232 (quoting 2 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 1115(b), at 185 (1977)).

²⁸⁵ *Id.* at 232-33.

²⁸⁶ *Id.*

A case which also ignored *General Telephone* is *Patrykus v. Gomilla*.²⁸⁷ This case involved a raid on a gay bar by drug enforcement officers with the assistance of the Chicago police.²⁸⁸ There were no warrants nor was there probable cause, and all patrons were forced to lie face down on the floor for one to three hours.²⁸⁹ The court found typicality and certified the class because the essence of the plaintiffs' claims and the class's claims was unconstitutional mass detention.²⁹⁰ This holding is consistent with *General Telephone*, but the alleged class claims went beyond detention to include searches, use of excessive force, interrogation and photographing, and individual mental distress. There was no comparison of the representative's claims and the class's claims on these issues and, to this extent, *General Telephone* was ignored. The court made a sweeping statement that the same course of conduct or similarity of legal theories controlled.²⁹¹

H. Eighth Circuit

Federal cases within the Eighth Circuit have followed *General Telephone*²⁹² in civil rights,²⁹³ securities,²⁹⁴ antitrust,²⁹⁵ mass tort,²⁹⁶ and various single issue decisions.²⁹⁷

²⁸⁷ 121 F.R.D. 357 (N.D. Ill. 1988).

²⁸⁸ *Id.* at 359-60.

²⁸⁹ *Id.* at 360.

²⁹⁰ *Id.* at 361-62.

²⁹¹ *Patrykus*, 121 F.R.D. at 362; *see also* *Riordan v. Smith Barney*, 113 F.R.D. 60 (N.D. Ill. 1986).

²⁹² 457 U.S. 147 (1982).

²⁹³ *See* *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1276 (8th Cir. 1990) (denying certification where plaintiff's anecdotal and statistical evidence did not raise an inference of class claims); *Briggs v. Anderson*, 796 F.2d 1009, 1017 (8th Cir. 1986) (affirming decertification of two subclasses (applicants and terminated employees) prior to ruling on merits due to a lack of motion to certify and lack of representation); *Roby v. St. Louis S.W. Ry.*, 775 F.2d 959, 961 (8th Cir. 1985) (affirming decertification of broad employment discrimination class because the claims of those who failed an examination were not typical of those not promoted for violating company rules); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982) (allowing use of subclasses, each represented, to deal with multiclaim employment discrimination class action); *O'Neal v. Riceland Foods*, 684 F.2d 577, 581 (8th Cir. 1982) (refusing to allow discharged plaintiff to represent claims of discrimination in hiring; evidence revealed that representative had no claim); *cf.* *McKenzie v. Crotty*, 738 F. Supp. 1287 (D.S.D. 1990) (allowing individual ex-inmate to press civil rights class claim against prison authorities despite release immediately after filing of suit); *Wakefield v. Monsanto Co.*, 120 F.R.D. 112, 115-17 (E.D. Mo. 1988) (limiting class to black nonexempt employees who received discriminatory treatment in pay and promotion);

court saw no conflict between present and former employees); *Holden v. Burlington N., Inc.*, 665 F.Supp. 1398, 1408 (D. Minn. 1987) (allowing expansion of employment discrimination class to include rejected applicants and approving negotiated settlement agreement over objection of five named plaintiffs).

²⁹⁴ See *Nelsen v. Craig-Hallum, Inc.*, 659 F.Supp. 480, 486 (D. Minn. 1987) (finding typicality when some plaintiffs relied on same oral and written representations of broker to the class; "fraud-on-the-market" creates a presumption of reliance); cf. *Irvin E. Schermer Trust v. Sun Equities Corp.*, 116 F.R.D. 332, 337 (D. Minn. 1987) (holding fact that plaintiff was a sophisticated investor who considered defendant a "greenmailer" precluded it from being sufficiently typical of class); *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 220-21 (D. Minn. 1986) (finding typicality in Rule 10(b)-5 action despite possible defenses regarding reliance; however, not certifying a common-law fraud and negligent misrepresentation class because of variation in applicable state law); *TBK Partners v. Chomeau*, 104 F.R.D. 127, 130 (E.D. Mo. 1985) (finding the fact that a very high percentage of shareholders voted in favor of merger precluded representative from having requisite typicality; established a conflict of interest in an action to reverse merger); *Kirkwood v. Taylor*, 590 F.Supp. 1375, 1385-86 (D. Minn. 1984) (finding no typicality because no representatives had shares directly traceable to initial public offering of stock).

²⁹⁵ See *Powell v. NFL*, 711 F.Supp. 959, 966-69 (D. Minn. 1989) (deeming several players typical in class challenge to college draft system; subclasses of veteran players and drafted rookies created to protect divergent interests); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268 (D. Minn. 1989) (allowing five named representatives with backgrounds of various uses and time frames to represent broad class of purchasers).

²⁹⁶ See *In re Tetracycline Cases*, 107 F.R.D. 719, 729 (W.D. Mo. 1985) (finding typicality but denying (b)(3) certification because superiority and predominance requirements were absent).

²⁹⁷ See *Jackson v. Rapps*, 132 F.R.D. 226 (W.D. Mo. 1990) (challenge to Missouri's process of reimbursement from noncustodial parents for AFDC benefits paid to custodial parents); *Abernathy v. Yeutter*, 725 F.Supp. 459 (W.D. Mo. 1989) (class challenge of method used to compute overpayment of food stamps when individual simultaneously received AFDC benefits); *Weaver v. Reagan*, 701 F.Supp. 717 (W.D. Mo. 1988) (challenge of Missouri's failure to cover AZT for qualified Medicaid patients with AIDS); *Hedge v. Lyng*, 689 F.Supp. 884, 887 (D. Minn. 1987) (challenge to the procedural improprieties in the election of Farmers Home Administration Board); *Freeman v. Hayek*, 635 F.Supp. 178, 181 (D. Minn. 1986) (due process challenge to city's termination of water service to residences based on charges due from previous owner without procedural protections); *Linguist v. Bowen*, 633 F.Supp. 846, 859 (W.D. Mo. 1986) (challenge to benefit reduction resulting in a dollar-for-dollar loss of income for recipients of Social Security and Railroad Retirement Act benefits).

I. Ninth Circuit

Federal courts within the Ninth Circuit have followed *General Telephone*²⁹⁸ in decisions concerning civil rights,²⁹⁹ constitutional law,³⁰⁰ securities,³⁰¹ antitrust,³⁰² single issue,³⁰³ and mass tort³⁰⁴ cases.

²⁹⁸ 457 U.S. 147 (1982).

²⁹⁹ See *Penk v. Oregon State Bd. of Higher Educ.*, 99 F.R.D. 508, 509-10 (D. Or. 1982) (allowing broad sex discrimination case to proceed only as far as a named representative had suffered each injury alleged in the class).

³⁰⁰ See *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 65-66 (D. Nev. 1985) (finding constitutional challenge to rules governing prostitution not certified because risk of representative's deportation precluded typicality and adequate representation); *Wilkinson v. FBI*, 99 F.R.D. 148, 158-59 (C.D. Cal. 1983) (allowing class to include "sustaining members," all members of at least one year, in Fifth and First Amendment challenge by organization allegedly harassed by FBI).

³⁰¹ See *Rolex Employees Retirement Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 662 (D. Or. 1991) (finding that trust's continued trading in stock after curative disclosure made it atypical of purported class of investors); *Weinberger v. Thornton*, 114 F.R.D. 599 (S.D. Cal. 1986) (allowing certification of single class represented by one purchaser from the market and one from public offering; also certifying pendent state law claims holding that typicality did not require similarity of reliance or damages); *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985) (deeming stockowner who bought and sold during period of nondisclosure to be sufficiently typical in conjunction with two other representatives); *Beebe v. Pacific Realty Trust*, 99 F.R.D. 60, 72-73 (D. Or. 1983) (finding that arbitrageurs were atypical because of differing motivations for purchase in fraud action surrounding tender offer); *McFarland v. Memorex Corp.*, 96 F.R.D. 357 (N.D. Cal. 1982) (allowing initial public offering purchasers to represent market purchasers but denying certification of pendent state law claims in broad securities fraud action).

³⁰² See *Mularkey v. Holsum Bakery, Inc.*, 120 F.R.D. 118 (D. Ariz. 1988) (limiting certification to issue of liability only in action brought by past distributors on behalf of present and future distributors; additional representatives required for damage issue because of inherent conflict between subparts of class).

³⁰³ See *Committee of Cent. Am. Refugees v. Immigration & Naturalization Serv.*, 682 F. Supp. 1055 (N.D. Cal. 1988) (right to representation and due process of detainees removed to a detention center prior to deportation hearing); *Cruz v. Bowen*, 672 F. Supp. 1300, 1305 (N.D. Cal. 1987) (challenge to special standards applied to Filipino persons applying for Social Security benefits); *Nehmer v. United States Veterans' Admin.*, 118 F.R.D. 113, 117 (N.D. Cal. 1987) (certifying as (b)(2) an administrative law challenge to the Dioxin and Radiation Exposure Compensation Act, which limits compensation to one skin condition); *National Assoc. of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Cal. 1986) (constitutional challenge to attorney's fees limits set in death and disability cases of veterans); *W.C. v. Heckler*, 629 F. Supp. 791, 795 (W.D. Wash. 1985) (challenge of procedure by which judges have rulings reviewed on administrative appeal); *Stolz v. United*

At least one district court decision departs somewhat from *General Telephone*. In *Lubin v. Sybedon Corp.*,³⁰⁵ an investor in limited partnerships brought a class action against a developer general partner, a group of accountants and lawyers, and others alleging violation of federal and state securities laws.³⁰⁶ The court certified the class finding that the misrepresentations and omissions were the same for the representatives and the class.³⁰⁷ Typicality of the requisite reliance element is normally resolved in securities cases by use of the fraud-on-the-market concept which presumes reliance by class and representative. However, in *Lubin*, reliance was highly individualized, and there was no fraud-on-the-market.³⁰⁸ Without a presumption of reliance, the court certified, citing language in *Newberg on Class Actions*,³⁰⁹ not to *General Telephone*.³¹⁰

J. Tenth Circuit

Cases in the Tenth Circuit have followed *General Telephone*³¹¹ in securities,³¹² antitrust,³¹³ single issue,³¹⁴ and breach of contract decisions.³¹⁵

Bhd. of Carpenters, 620 F. Supp. 396 (D. Nev. 1985) (alleging violation of federal law when increased dues issue was tacked onto other motion).

³⁰⁴ See *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258 (S.D. Cal. 1988) (finding nationwide class of pet owners poisoned by product not certified due to differences in state law and differences in the type and extent of damages suffered); *Wehner v. Syntex Corp.*, 117 F.R.D. 641 (N.D. Cal. 1987) (allowing property owner to bring class claims for damages against dioxin manufacturer despite variations in extent and type of injuries, noting subclasses might be necessary if conflicts arose later in litigation).

³⁰⁵ 688 F. Supp. 1425 (S.D. Cal. 1988).

³⁰⁶ *Id.* at 1431.

³⁰⁷ *Id.* at 1457-63.

³⁰⁸ *Id.* at 1459-60.

³⁰⁹ 5 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 8816 (1977).

³¹⁰ *Lubin*, 688 F. Supp. at 1461. Compare *Lubin* with *In re Unioil Securities Litigation*, 107 F.R.D. 615 (C.D. Cal. 1985), in which the same misrepresentations and omissions were made to the class. *Id.* at 618-19. The defendant argued that representatives who purchased after "curative" disclosures (a single press release) could not satisfy typicality. The court went forward with certification and refused to rule on the effect of the curative disclosure. *Id.* at 620-21. This case was eventually dismissed and sanctions were imposed on plaintiff's counsel. *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548 (9th Cir. 1986).

³¹¹ 457 U.S. 147 (1982).

³¹² See *Spivak v. Petro-Lewis Corp.*, 120 F.R.D. 693, 698 (D. Colo. 1987) (determining, in tender offer, that holders who failed to sell and were "frozen out" were not typical of investors who surrendered shares voluntarily; court created subclasses for each); *In re Texas Int'l Sec. Litig.*, 114 F.R.D. 33, 44 (W.D. Okla. 1987) (finding the fact that

K. Eleventh Circuit

Federal courts within the Eleventh Circuit have followed *General Telephone*³¹⁶ in civil rights,³¹⁷ single issue,³¹⁸ and securities cases.³¹⁹

various representatives purchased at different times after same misrepresentations did not defeat typicality); *In re Storage Technology Corp. Sec. Litig.*, 113 F.R.D. 113 (D. Colo. 1986) (relying on fraud-on-the-market theory as well as a common scheme to certify broad securities fraud class action); *Masri v. Wakefield*, 106 F.R.D. 322, 324 (D. Colo. 1984) (holding that substantial defenses unique to the named representatives and perceived conflict within proposed class precluded typicality and adequate representation).

³¹³ See *Dubin v. Miller*, 132 F.R.D. 269, 274-75 (D. Colo. 1990) (holding, in securities action based on fraud-on-the-market theory, that reliance on company insiders and nonmarket information might defeat typicality); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 422-24 (D.N.M. 1988) (certifying, in antitrust and contract action, class of all customers who purchased wire maintenance via either negative option or pursuant to misrepresentations; court retained state law claims where no obvious conflicts existed among relevant laws of seven states); *Steiner v. Ideal Basic Indus., Inc.*, 127 F.R.D. 192, 193-94 (D. Colo. 1987) (finding that, in class extending over period of five years, relative time of purchase or sophistication of investor did not defeat typicality).

³¹⁴ See *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 680 (D. Kan. 1991) (challenge, based on Due Process Clause and federal statutes, to reduction of agricultural subsidies to wheat farmers).

³¹⁵ See *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665 (D. Kan. 1989) (allowing former employee to represent class including current employees in fraud and breach of contract action against employer for the computation of compensation under same written documents).

³¹⁶ 457 U.S. 147 (1982).

³¹⁷ See *Coon v. Georgia Pac. Corp.*, 829 F.2d 1563, 1566-67 (11th Cir. 1987) (refusing to certify across-the-board discrimination case in which a single representative alleged discrimination in promotion); *Griffin v. Carlin*, 755 F.2d 1516, 1531-32 (11th Cir. 1985) (22 named representatives challenging post office's multicomponent promotion process as discriminatory; certifying class of those adversely affected in advancement); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 678-80 (11th Cir. 1983) (refusing to certify without proof of Rule 23 factors); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1346-47 (11th Cir. 1983) (declining to include applicants in class involving discrimination in advancement and layoff procedures); *Evans v. United States Pipe & Foundry Co.*, 696 F.2d 925, 928-30 (11th Cir. 1983) (refusing to certify proposed across-the-board class action; remanded for consideration of numerosity of class limited to those adversely impacted by discrimination in promotion); *Calloway v. Westinghouse Elec. Corp.*, 642 F. Supp. 663, 670-72 (M.D. Ga. 1986) (limiting class in employment discrimination to those who were or had been employees at facility, excluding those who merely applied); *Washington v. Brown & Williamson Tobacco Corp.*, 106 F.R.D. 592, 594 (M.D. Ga. 1985) (denying certification because representative showed no nexus to the class); *Jordan v. Swindall*, 105 F.R.D. 45,

47-48 (M.D. Ala. 1985) (finding typicality in challenge of allegedly discriminatory advancement and training in police force based on a subjective evaluation process); *Grimes v. Pitney Bowes, Inc.*, 100 F.R.D. 265, 267-70 (N.D. Ga. 1983) (denying certification based on individuality of claims and defenses and lack of showing of numerosity); *Johnson v. Montgomery County Sheriff's Dep't*, 99 F.R.D. 562, 564-66 (M.D. Ala. 1983) (allowing a class sex discrimination attack on behalf of applicants and employees because the hiring, promotion, and transfer policies were interrelated by one general discriminatory policy); *Jackson v. City of Belle Glade*, 95 F.R.D. 384, 386 (S.D. Fla. 1982) (refusing to find typicality based merely on common racial background absent proof of harm typical to the representatives and class members); *Hawkins v. Fulton County*, 95 F.R.D. 88, 92-93 (N.D. Ga. 1982) (refusing to certify an across-the-board discrimination case but leaving open the possibility of future reconsideration with appropriate subclasses); *Nation v. Winn-Dixie Stores, Inc.*, 95 F.R.D. 82, 85-88 (N.D. Ga. 1982) (refusing to certify an across-the-board race discrimination case absent significant proof that the defendant operated under a general policy of discrimination).

³¹⁸ See *Haitian Refugee Ctr., Inc., v. Nelson*, 694 F. Supp. 864, 866 (S.D. Fla. 1988) (challenge to allegedly illegal burden of proof and procedural mechanisms in review of applications for residency under the Special Agricultural Workers Program); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1061-62 (M.D. Fla. 1988) (holding adequacy of representation not undermined because some members of class wished to proceed to trial seeking a different relief while representatives chose to settle; there was no sacrifice of interest of some class members to other class members); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1372 (M.D. Ala. 1986) (challenge to at-large election of county commissioners based on the Voting Rights Act); *Armstead v. Pingree*, 629 F. Supp. 273, 275, 278-79 (M.D. Fla. 1986) (mentally retarded and diseased patients' challenge to various acts by state based on constitutional grounds; subclasses used to group those with typical harms based on injuries and diagnoses); *Lawson v. Wainwright*, 108 F.R.D. 450, 452 (S.D. Fla. 1986) (alleging constitutional violation by Florida prison officials' refusal to allow Hebrew Israelites access to religious literature); *Thomas v. Heckler*, 598 F. Supp. 492, 498 (M.D. Ala. 1984) (challenge by Social Security beneficiaries to Secretary's failure to follow binding case precedent regarding requirements for termination of previously determined benefits); *Harris v. Graddick*, 593 F. Supp. 128, 136 (M.D. Ala. 1984) (challenge of underrepresentation of African Americans as polling officials under Voting Rights Act; certified plaintiff class of African-American residents of Georgia and defendant class of each county's appointing officials); *NAACP v. State*, 99 F.R.D. 16 (S.D. Ga. 1983) (granting conditional (b)(2) certification and allowing a number of African-American children to challenge state practices which placed a disproportionately high percentage of African Americans in predominantly African-American classes); *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683 (N.D. Ga. 1983) (concerning validity of utilizing 360-day year for interest computations and meaning of "prime rate" under a specific loan agreement).

³¹⁹ See *Shores v. Sklar*, 844 F.2d 1485, 1489 (11th Cir. 1988) (allowing certification, finding typicality in fraud-on-the-market case where the representative did not receive offering materials); *Ross v. Bank S.*, 837 F.2d 980, 990-91 (11th Cir. 1988) (finding typicality despite concurrent reliance of one representative on oral statements of broker);

An illustrative contract decision in which the court refused to find typicality is *Brooks v. Southern Bell Telephone & Telegraph Co.*³²⁰ The dispute involved employment benefits arising in separate contracts, letters, instructions, or oral representations. The laws of four different states were applicable.³²¹

L. District Of Columbia Circuit

Federal courts within the District of Columbia have followed the *General Telephone*³²² standard in civil rights,³²³ securities,³²⁴ mass tort,³²⁵ contract,³²⁶ and single issue³²⁷ cases.

Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 722-23 (11th Cir. 1987) (finding typicality in a fraud-on-the-market action despite possible individual reliance on oral representations by broker; state law actions deemed inappropriate for class treatment); Sheftelman v. Jones, 667 F. Supp. 859, 863-64 (N.D. Ga. 1987) (finding representative's claims typical based on fraud-on-the-market theory despite allegations that his additional individual misrepresentation claim made him atypical and that he could not adequately represent those who had not read the offering materials); Anderson v. Bank of the S., 118 F.R.D. 136, 142 (M.D. Fla. 1987) (considering subclasses based on time of purchase relative to several curative disclosures and available market information because of prolonged period of sale for bonds); Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048, 1055 (N.D. Ga. 1986) (concluding that reliance concerns and largely oral representations precluded adequate representation and (b)(3) predominance; no fraud-on-the-market because issue was not publicly traded).

³²⁰ 133 F.R.D. 54 (S.D. Fla. 1990).

³²¹ *Id.* at 56-58.

³²² 457 U.S. 147 (1982).

³²³ See *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1409 (D.C. Cir. 1988) (narrowing class in racial employment discrimination suit to exclude challenge to job requirement of high school diploma because named plaintiffs were not injured by that requirement); *Wagner v. Taylor*, 836 F.2d 578, 588-94 (D.C. Cir. 1987) (holding allegation of bias in performance rating system insufficient to allow plaintiff to represent class that included disappointed job applicants because they were not subjected to performance rating system); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410-11 (D.C. Cir. 1984) (determining that issue not suitable for class treatment because individual issues regarding detention overrode class issues); *Gonzalez v. Brady*, 136 F.R.D. 329, 330-31 (D.D.C. 1991) (holding lack of showing that others in class had been discriminated against precluded class certification); cf. *McKenzie v. Sawyer*, 684 F.2d 62, 74 (D.C. Cir. 1982) (allowing journeymen to represent class that included those seeking promotion beyond journeymen status because typicality satisfied when similar employment practices applied to related employment decisions); *Rodriguez v. Department of the Treasury*, 131 F.R.D. 1, 7 (D.D.C. 1990) (declining to include discouraged applicants due to their speculative existence caused class to fail on numerosity); *Mayfield v. Meese*, 704 F. Supp. 254, 258

IX. IDENTITY OF CLAIMS AFTER *GENERAL TELEPHONE*

Before examining identity of claims in antitrust, mass tort, securities, and employment discrimination and other civil rights claims, we make two observations. First, identity of claims during the certification process does not include identity of remedies. It has never been required that each member of the class seek the same damages, only that the liability elements must coincide. Even if the relief being sought is equitable, possible differences in proposed injunctive relief do not defeat certification. The courts have properly concluded that speculative differences in eventual relief should not prevent the preliminary finding of certification.³²⁸ Thus, a remedies analysis normally is deferred until settlement or trial. However, this generality has a caveat. If the remedies

(D.D.C. 1988) (declining to expand class represented by plaintiff who did not apply for promotion to include those who applied for promotion); *Sperling v. Donovan*, 104 F.R.D. 4, 6 (D.D.C. 1984) (denying certification of class of white employees in reverse discrimination case because across-the-board racial allegations do not satisfy Rule 23 requirements).

³²⁴ See *Fleck v. Cablevision VII, Inc.*, 763 F. Supp. 622, 625 (D.D.C. 1991) (holding that plaintiff's unique defense based on difference in reliance rendered claim atypical); *Kas v. Financial Gen. Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1985) (denying certification because of atypical defenses applicable to representative).

³²⁵ See *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (holding class certification inappropriate because failure to show common defect in transmission meant no commonality of fact between class members); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 264 (D.D.C. 1990) (holding class treatment inappropriate because common issues of law and fact did not predominate and class unmanageable because of complexity of issues).

³²⁶ See *Committee of Blind Vendors v. District of Columbia*, 695 F. Supp. 1234 (D.D.C. 1988) (allowing leaders of business association to represent class because claims based on statutory and contract violations common to class).

³²⁷ See *Waters v. Barry*, 711 F. Supp. 1125, 1127 (D.D.C. 1989) (challenge to District of Columbia juvenile curfew law); *Duggan v. Bowen*, 691 F. Supp. 1487, 1502 (D.D.C. 1988) (stating Rule 23 requirements met when "a class action would serve as an efficient method of litigating the issues in the case"); *Littlewolf v. Hodel*, 681 F. Supp. 929, 936 (D.D.C. 1988) (permitting class challenge to constitutionality of Indian Claims Act of 1985 because it concerned same event and course of conduct); *Vargas v. Meese*, 119 F.R.D. 291, 293 (D.D.C. 1987) (single issue concerning cutoff date for filing of adjustment status for immigration purposes).

³²⁸ 7B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1785 (2d ed. 1972); see also *Rental Car, Inc., v. Westinghouse Elec. Corp.*, 496 F. Supp. 373, 381 (D. Mass. 1980); cf. *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985).

requested at the certification hearing reveal a clear conflict of interest within the class or between counsel and class, certification will be adversely affected.³²⁹

Second, the requirement of standing to sue, discussed in various class cases only necessitates that the representative and the class have suffered some injury and seek some relief.³³⁰ The standing requirement does not require that the representative claim be the same as the class claim.³³¹

A. Identity of Claims in Antitrust Actions

Identity of claims requires sameness of the essential elements of an action. Courts generally have found identity of claims in antitrust conspiracy cases because "[i]n order to prevail on the merits . . . the plaintiffs will have to prove the same major elements that the absent members of the class would have to prove[:] . . . a conspiracy, its effectuation and resulting damages."³³² Similarly, courts have certified both horizontal³³³ and vertical³³⁴ price-fixing

³²⁹ See *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 698 (7th Cir. 1986) (refusing to approve settlement noting conflict between those seeking liberalized benefit qualifications and those who were unrepresented and sought only to recover for negligent asset management; both groups were originally certified as a single class); see also *Gonzales v. Cassidy*, 474 F.2d 67, 75-76 (5th Cir. 1973); *Air Line Stewards & Stewardesses Assoc., Local 550 v. American Airlines*, 490 F.2d 636, 643 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); *Mularkey v. Holsum Bakery, Inc.*, 120 F.R.D. 118, 121 (D. Ariz. 1988) (limiting representation by past distributors on behalf of present and future distributors to issue of liability only; additional representatives required for damage issue because of inherent conflict between subparts of class).

³³⁰ See *O'Shea v. Littleton*, 414 U.S. 488, 493-95 (1973) (named plaintiff must have suffered injury), *vacated*, 414 U.S. 514 (1974); *Swain v. Brinegar*, 517 F.2d 766, 780 (7th Cir. 1975) (class must have suffered injury); Mary K. Kane, *Standing, Mootness, and Federal Rule 23: Balancing Perspectives*, 26 BUFF. L. REV. 83, 94-99 (1976).

³³¹ See *Harris v. White*, 479 F. Supp. 996, 1009 (D. Mass. 1979); *WRIGHT ET AL.*, *supra* note 119, § 1761 nn.3-4.

³³² *Cumberland Farms, Inc., v. Browning-Ferris Indus.*, 120 F.R.D. 642, 647 (E.D. Pa. 1988); see also *In re Chlorine & Caustic Soda Antitrust Litig.*, 116 F.R.D. 622, 626 (E.D. Pa. 1987).

³³³ See *Weiss v. York Hosp.*, 745 F.2d 786, 810-11 (3d Cir. 1984) (holding plaintiff who was denied staff privileges by hospital could represent class that included osteopaths who did not apply because all were part of class of "intended victims" of hospital's discriminatory policy); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268, 271 (D. Minn. 1989) (nationwide price-fixing of wirebound boxes); *Cumberland Farms, Inc.*, 120 F.R.D. at 645 (holding typicality satisfied in horizontal price-fixing claim against containerized garbage disposal industry; the industry operated on a standardized nationwide basis); *Vasiliow Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 345, 348 (E.D.N.Y. 1987)

cases provided the same conspiracy and the same acts affect representative and class.

However, if different conspiracies or acts of conspiracy affected representatives and class members, the class will not be certified. In *Jackshaw Pontiac v. Cleveland Press*,³³⁵ advertisers sued newspapers for creating a monopoly, but certification was denied because the named representatives utilized only several of the over one hundred advertising rates that were increased because of the alleged conspiracy.³³⁶ In such a case, the representative lacks motivation to litigate, prove, and settle the nonsimilar elements among claims.³³⁷ In some instances, the lack of identity may be solved by creating subclasses (with appropriate representatives) or by naming additional representatives.³³⁸

Whether pendent state claims will be certified turns on the same analysis. If the essential elements are the same, the pendent state claims are certified as part

(alleged price-fixing by brewers and beer franchise wholesalers against independent wholesalers); *Uniondale Beer Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 340, 342-45 (E.D.N.Y. 1987) (certifying statewide plaintiff class of beer retailers in horizontal price-fixing case based on use of exclusive territory agreements but declining to certify defendant class because no numerosity); *In re Chlorine & Caustic Soda Antitrust Litig.*, 116 F.R.D. at 625 (holding typicality satisfied in horizontal price-fixing case because named plaintiffs would have to prove same elements as the class in establishing a conspiracy, its effectuation, and resulting damages); *Rios v. Marshall*, 100 F.R.D. 395, 406 (S.D.N.Y. 1983) (limiting claims to those years in which named plaintiffs raised claims in action alleging conspiracy to replace citizen farm workers); *United Nat'l Records, Inc. v. MCA, Inc.*, 99 F.R.D. 178, 182 (N.D. Ill. 1983) (alleged nationwide conspiracy to fix prices of records and tapes).

³³⁴See *Mularkey v. Holsum Bakery, Inc.*, 120 F.R.D. 118, 122 (D. Ariz. 1988) (alleged conspiracy to fix prices paid to independent distributors of baked goods).

³³⁵ 102 F.R.D. 183 (N.D. Ohio 1983).

³³⁶ *Id.* at 190-92.

³³⁷See also *Vasiliow Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 345, 347-48 (E.D.N.Y. 1987) (certifying plaintiff class in horizontal price-fixing case based on system of exclusive territory contracts; declining to certify plaintiff class regarding vertical price-fixing claim or to certify defendant class as to either vertical or horizontal claim); *Butt v. Allegheny Pepsi-Cola Bottling, Inc.*, 116 F.R.D. 486, 490 (E.D. Va. 1987); (defeating typicality because of evidence that some defendants might have varied from alleged price-fixing conspiracy in dealings with some class members).

³³⁸See *Powell v. NFL*, 711 F. Supp. 959 (D. Minn. 1989); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268 (D. Minn. 1989).

of the federal action.³³⁹ If the elements differ, the pendent claims are not certified.³⁴⁰

B. *Identity of Claims in Mass Torts*

Although "[i]n the past, courts have not looked favorably upon class certification in mass tort cases on the ground that 'significant questions, not only of damages, but of liability and defenses of liability would be present, affecting the individuals in different ways [such that class actions] would degenerate in practice into multiple lawsuits separately tried,'"³⁴¹ courts have increasingly accepted its use.³⁴²

In a typical mass bus, train, or airplane accident, the essential elements of duty, negligence, or strict liability and causation do not differ between representative and class; thus, a class action is appropriate. One district court stated the following:

In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.³⁴³

As with other types of class actions, differences in damages are not enough to deny certification, particularly in cases of mass disaster in which individual defenses are unlikely to be raised.³⁴⁴

³³⁹ See *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 427-36 (D.N.M. 1988).

³⁴⁰ See *Thompson v. Midwest Found. Indep. Physicians Assoc.*, 117 F.R.D. 108, 113-16 (S.D. Ohio 1987) (finding typicality for the federal claims of physicians under contract with defendant because policies and practices were the same on a class-wide basis; refusing to certify pendent state claims because of individualized issues of fact and law under state law).

³⁴¹ *Sala v. National R.R. Passenger Corp.*, 120 F.R.D. 494, 495 (E.D. Pa. 1988) (quoting FED. R. CIV. P. 23(b)(3) advisory committee's note).

³⁴² *Id.* at 496-97; see also *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986).

³⁴³ *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

³⁴⁴ See *Sala*, 120 F.R.D. at 497-98 (certifying class of train accident victims; typicality satisfied though damage issues would differ); *In re Johnson*, 80 B.R. 791, 796 (Bankr. E.D. Va. 1987) (holding typicality met in claim against trustee of alleged pyramid scheme operator because all asserted a single claim that the funds held by the trustee were not part of the bankruptcy estate); *In re Fleet*, 76 B.R. 1001, 1008-09 (Bankr. E.D. Pa. 1987) (certifying debtor class allegedly subject to same unfair or deceptive acts of

If the mass tort involves product liability, toxic waste, or similar circumstances, the essential elements of duty, negligence, strict liability, causation, breach of contract or warranty, and adequacy of warning may differ within the class. In a few such cases, the courts have certified class actions after careful analysis of the issues. For example, in *Wehner v. Syntex Corp.*,³⁴⁵ the court allowed a property owner to bring class claims against a dioxin manufacturer despite variations in extent and type of injuries, noting that subclasses could be necessary later in litigation.³⁴⁶

In the majority of such cases, however, the courts have denied certification because "no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues."³⁴⁷ For example, in *Ikonen v. Hartz Mountain Corp.*,³⁴⁸ a class of pet owners suing a manufacturer of allegedly poisonous flea and tick spray was denied certification.³⁴⁹ The court found that the individual case histories of the pets concerned different "negligence, strict products liability, breach of warranty, fraud, and adequacy of warning issues."³⁵⁰

bankruptcy service company); *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 427-30 (E.D. Pa. 1984) (certifying nationwide class of public and private school districts because named plaintiffs' claims were sufficiently coextensive with those of the class to insure full, fair, and vigorous prosecution).

³⁴⁵ 117 F.R.D. 641 (N.D. Cal. 1987); see also *Sterling*, 855 F.2d 1188 (allowing personal injury and property liability claims in class action brought on behalf of residents living near corporation's chemical waste burial site; individual damage claims would be tried separately); *Jenkins v. Raymark Indus.*, 109 F.R.D. 269 (E.D. Tex. 1985) (certifying all personal injury asbestos cases in district as one because degree of harm would not defeat typicality as long as harm was of same type; a special master was appointed to determine disparity between representative and class claims).

³⁴⁶ *Wehner*, 117 F.R.D. at 643-45.

³⁴⁷ *Sterling*, 855 F.2d at 1197; see also *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (holding class certification inappropriate because failure to show common defect in transmission means no commonality of fact between class members); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 264 (D.D.C. 1990) (holding class treatment inappropriate because common issues of law and fact did not predominate and class treatment was unmanageable because of complexity of issues); *McKernan v. United Technologies Corp.*, 120 F.R.D. 452, 453 (D. Conn. 1988) (holding claims of named plaintiff who sold his helicopter not typical of those who still owned their helicopters in product liability action against manufacturer).

³⁴⁸ 122 F.R.D. 258 (S.D. Cal. 1988).

³⁴⁹ *Id.* at 266.

³⁵⁰ *Id.* at 262. In some product liability cases, issues of conflicting state laws and general complexity of issues have rendered class treatment inappropriate. See *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 276 (D.D.C. 1990); *Ikonen v. Hartz Mountain Corp.*,

The rejection of certification in the nonaccident mass tort cases is a correct application of *General Telephone*³⁵¹ and the historical standard of identity of claims. With differing duty, causation, negligence, and state laws, the representative lacks the motivation and proof to establish the differing class claims. The self-interest of the representative may cause a settlement which disfavors or rejects the differing claims. In short, the self-interest of the representative does not benefit the entire class, and class treatment is, therefore, improper. Of course, most mass tort cases are in the (b)(3) category, in which notice and the opportunity to appear or to opt out are required, thereby possibly curing fairness and due process problems.³⁵²

C. *Identity of Claims in Security Cases: Same Misrepresentations or Nondisclosures*

Identity of claims in securities actions requires that the representative and the class complain of the same misrepresentations. If the representations differ, certification is generally denied.³⁵³ Similarly, if the case involves failure to

122 F.R.D. 258, 265-66 (S.D. Cal. 1988); *In re Tetracycline Cases*, 107 F.R.D. 719, 724 (W.D. Mo. 1985).

³⁵¹ 457 U.S. 147 (1982).

³⁵² *E.g.*, *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

³⁵³ *See VMS Sec. Litig.*, 136 F.R.D. 466, 474-76 (N.D. Ill. 1991) (using subclasses of purchasers in public offering and from the market); *In re Bexar County Health Facility Dev. Corp. Sec. Litig.*, 125 F.R.D. 625, 628 (E.D. Pa. 1989) (holding typicality satisfied in class of original purchasers of bonds because same alleged material misrepresentations and omissions were contained in offering statement); *In re IGI Sec. Litig.*, 122 F.R.D. 451, 456 (D.N.J. 1988) (focusing typicality inquiry in securities case on defendant's, not plaintiff's, behavior); *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 122 F.R.D. 177, 180-81 (E.D. Pa. 1988) (holding uniform statements in offering circular satisfied typicality in case alleging excessive and unconscionable markups in bond sales); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 121 F.R.D. 642, 647-48 (M.D. Pa. 1988) (holding reliance on news reports did not defeat typicality in case alleging misleading proxy statements in connection with merger); *In re Western Union Sec. Litig.*, 120 F.R.D. 629, 634 (D.N.J. 1988) (alleging reliance on uniform public statements satisfied typicality requirement); *Priest v. Zayre Corp.*, 118 F.R.D. 552, 556-57 (D. Mass. 1988) (holding class period covering release of different documents appropriate if the documents repeated the same misrepresentations); *In re Gruber v. Prudential-Bache Sec., Inc.*, 679 F. Supp. 165, 183 (D. Conn. 1987) (holding named plaintiff who purchased interest in partnership from third party could not represent class of investors who purchased interests in same partnership directly from defendant because different representations were involved); *In re ORFA Sec. Litig.*, 654 F. Supp. 1449, 1460-61 (D.N.J. 1987) (finding typicality satisfied

disclose, the same nondisclosures must affect the representative and the class in order to satisfy identity of claims.³⁵⁴

because claims of fraud and misrepresentation based on same series of reports and news releases); *Koenig v. Benson*, 117 F.R.D. 330, 339-40 (E.D.N.Y. 1987) (certifying later purchaser who acquired stock to represent earlier purchasers because actionable misrepresentation was contained or concealed in earlier annual report); *Kirby v. Cullinet Software, Inc.*, 116 F.R.D. 303, 308 (D. Mass. 1987) (holding that allegation of "common course of conduct" allowed named plaintiffs to represent subsequent purchasers whose reliance was based on interrelated and cumulative misrepresentations during a limited three-month period); *Snider v. Upjohn Co.*, 115 F.R.D. 536, 538 (E.D. Pa. 1987) (holding typicality satisfied because misrepresentations and omissions contained in public statements were common to the class); *Gavron v. Blinder Robinson & Co.* 115 F.R.D. 318, 323 (E.D. Pa. 1987) (determining that defendant's allegation that plaintiff relied on oral communications of broker did not defeat typicality in claim based on fraud-on-the-market theory); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 114 F.R.D. 48, 53 (S.D.N.Y. 1987) (holding variations in interest due or dates and amounts of redemption did not defeat typicality action over same misrepresentations in sale of trust bonds); *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986) (holding differences involving date, type and manner of purchase, investor's perception of the transaction, or even information furnished did not destroy typicality if named plaintiff was "victim of same material omissions and the same consistent course of conduct"); *Caleb & Co. v. E.I. DuPont de Nemours & Co.*, 110 F.R.D. 316, 318-19 (S.D.N.Y. 1986) (finding a claim of failure to pay cash promptly after tender of stock constituted "common course of conduct" that satisfied typicality requirement); *Michaels v. Ambassador Group Inc.*, 110 F.R.D. 84, 88-90 (E.D.N.Y. 1986) (finding that conflicts between early and later purchasers did not defeat typicality where the misrepresentations or omissions relied on were interrelated and relied on by the entire class); *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985) (deeming stockholder who bought and sold during period of nondisclosure to be sufficiently typical in conjunction with two other representatives); *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, 447-48 (E.D. Pa. 1985) (holding failure to show reliance on standardized oral or written misrepresentations defeated typicality); *In re Consumers Power Sec. Litig.*, 105 F.R.D. 583, 612-13 (E.D. Mich. 1985) (five subclasses used, each encompassing purchasers pursuant to a different misrepresentation); *Kirkwood v. Taylor*, 590 F. Supp. 1375, 1385-86 (D. Minn. 1984) (finding no typicality in case involving initial public offering because no representatives had shares directly traceable to initial public offering); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 887-88 (D.N.J. 1984) (finding no typicality in claim based on oral misrepresentations because of lack of proof of "essentially identical communications" to other class members).

³⁵⁴ See *In re Boardwalk Marketplace Sec. Litig.*, 122 F.R.D. 4, 7 (D. Conn. 1988) (holding that some factual differences in prospectus did not defeat typicality when each omitted same material matters relating to financing and the promoters); *Bresson v. Thomson McKinnon Sec., Inc.*, 118 F.R.D. 339, 344 (S.D.N.Y. 1988) (finding typicality in case concerning sale of limited partnerships where communications to class members all contained the same omissions and half-truths); *Shankroff v. Advest, Inc.*, 112 F.R.D. 190,

The above principles control claims based on written misrepresentation. The general rule is that an action based substantially on oral rather than written communications is inappropriate for treatment as a class action.³⁵⁵ Certification in such cases, however, is permissible if the "allegedly fraudulent oral communications were *standardized*."³⁵⁶ One court has ruled that such circumstances exist if the oral statements originate from a "common source," such as the same documents, or an identical negligent refusal by broker-dealers to "conduct their own investigations."³⁵⁷

1. *Timing of the Purchases by the Representative and the Class*

An interrelated issue is whether an earlier purchaser may represent later purchasers and vice versa. In general, if the same misrepresentations or nondisclosures affect each time period, certification is granted.

In *In re One Bancorp Securities Litigation*,³⁵⁸ the defense contended that the representative claims were atypical of at least part of the class because the named representatives purchased late in the class period and could not properly represent earlier purchasers.³⁵⁹ The court concluded that such differences did not render the claims of later purchasers atypical because the misrepresentations were interrelated, cumulative, and came from specific documents.³⁶⁰

194 (S.D.N.Y. 1986) (holding typicality satisfied because same omissions affected representative and the class).

³⁵⁵ See *Shivangi v. Dean Witter Reynolds, Inc.*, 107 F.R.D. 313, 324 (S.D. Miss. 1985) (holding that a case based on oral misrepresentations inappropriate for class treatment because of individual nature of communication); see also *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 887-88 (E.D. Pa. 1984).

³⁵⁶ *Seiler*, 102 F.R.D. at 888; see also *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, 449 (E.D. Pa. 1985).

³⁵⁷ *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 427 (S.D.N.Y. 1986).

³⁵⁸ 136 F.R.D. 526 (D. Me. 1991).

³⁵⁹ *Id.* at 530.

³⁶⁰ *Id.* at 529-31; see also *Randle v. Spectran*, 129 F.R.D. 386, 391 (D. Mass. 1988) (allowing named plaintiffs who continued to purchase stock after company disclosure of losses to represent earlier purchasers); *Anderson v. Bank of the S.*, 118 F.R.D. 136, 142 (M.D. Fla. 1987) (considering subclasses based on time of purchase relative to several curative disclosures and available market information because of prolonged period of sale for bonds); *In re Texas Int'l Sec. Litig.*, 114 F.R.D. 33, 44 (W.D. Okla. 1987) (holding that the fact that various representatives purchased at different times after same misrepresentations did not defeat typicality); *Klein v. A.G. Becker Paribas Inc.*, 109 F.R.D. 646, 652 (S.D.N.Y. 1986) (holding later purchasers could not represent earlier purchasers because disclosures rendered their claims atypical); *Kronfeld v. Trans World Airlines*, 104 F.R.D. 50, 54 (S.D.N.Y. 1984) (holding purchases by plaintiff after disclosure did not

Another issue, related to the timing of the purchase, is that if there have been material disclosures between the time of purchase by the representative and the time of the purchase by the class, such disclosures create substantial differences in representation and reliance elements and certification is not permitted.³⁶¹ Only a small number of cases are contrary to the foregoing analysis and must be deemed contrary to *General Telephone*.³⁶² These courts have usually been misled by ambiguous formulas such as "common course of conduct," "same legal theory," or "markedly different positions."³⁶³

Because representations (and reliance) must be the same, the representative and the class must have owned the same stock.³⁶⁴ However, purchasers of call or put options are acceptable representatives for a class of purchasers.³⁶⁵

render claim atypical because materiality of alleged omissions was judged by objective not subjective standard and applied to entire class); *cf. In re Bank of Boston*, 762 F. Supp. 1525, 1532 (D. Mass. 1991) ("a plaintiff has standing to challenge only those events occurring prior to the date of his last purchase or sale of stock; it is impossible for a plaintiff to have been misled by events occurring afterward"); *Adair v. Sorenson*, 134 F.R.D. 13 (D. Mass. 1991).

³⁶¹ See *Klein*, 109 F.R.D. at 652-53.

³⁶² 457 U.S. 147 (1982).

³⁶³ See *Garfinkel v. Memory Metals, Inc.*, 695 F. Supp. 1397, 1402-04 (D. Conn. 1988) (holding a series of press releases that contained different alleged misrepresentations were a "common course of conduct" satisfying typicality); *Tedesco v. Mishkin*, 689 F. Supp. 1327 (S.D.N.Y. 1988) (certifying class of purchasers in investment vehicles over 15-year period even though each vehicle was different and not all purchasers invested in all vehicles); *Longden v. Sunderman*, 123 F.R.D. 547, 552 (N.D. Tex. 1988) (certifying class that included 4,000 investors in 121 limited partnerships over five years because of "high incidence of similarly misleading financial information common throughout all of the [offerings]"); *Angelastro v. Prudential-Bache Sec., Inc.*, 113 F.R.D. 579, 582-83 (D.N.J. 1986) (finding typicality but refusing to certify under (b)(3) because atypical issues predominated); *Shamberg v. Ahlstrom*, 111 F.R.D. 689, 695-97 (D.N.J. 1986) (certifying class that included later purchasers even though there were allegations of different misrepresentations and nondisclosures over period of time because all were part of a common scheme to defraud).

³⁶⁴ See *Fry v. UAL Corp.*, 136 F.R.D. 626 (N.D. Ill. 1991); *In re One Bancorp Sec. Litig.*, 136 F.R.D. 526, 528 (D. Me. 1991) (restricting certified class to purchasers of common stock and refusing to allow named plaintiff who purchased stock through corporation of which he was president to represent class); *Spivak v. Petro-Lewis Corp.*, 120 F.R.D. 693, 698 (D. Colo. 1987) (determining, in tender offer, that holders who failed to sell and were "frozen out" were not typical of investors who surrendered shares voluntarily; subclasses created for each).

³⁶⁵ See *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 372-73 (D. Del. 1990) (allowing call option purchaser to represent class that included common stock purchasers because both relied on fraud-on-the-market theory); *Tolan v. Computervision Corp.*, 696 F.

2. Reliance

The justifiable reliance of the plaintiff is an essential element in fraud and securities cases. Reliance on its face is individualized. Hence, reliance by a representative does not prove reliance by the class members. This can be a serious barrier to class certification.

In the federal courts, the "fraud-on-the-market theory" creates a presumption of reliance for all those who purchase from the market relying on the market's integrity. Fraud directed to artificially inflate market price has a presumed effect on all class members. Open market purchasers who claim they were damaged by a fraud-on-the-market are not required to prove individual reliance on particular misrepresentations or omissions if the misrepresentations or nondisclosures are material.³⁶⁶ Thus, if the fraud-on-the-market theory is applicable, the element of reliance at the onset is identical for the representative and the class.³⁶⁷

The fact that the representative concurrently relies on the market and on a third party, such as a broker, does not alter this result.³⁶⁸ A basic part of the

Supp. 771, 774-77 (D. Mass. 1988) (certifying class that included purchasers of options as well as purchasers of common stock); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 112 F.R.D. 383, 387 (S.D.N.Y. 1986) (certifying class that included tenderers of shares and purchasers of calls during tender period because both affected by same misrepresentations that artificially inflated the price of company securities).

³⁶⁶ See *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972); *Panzirer v. Wolf*, 663 F.2d 365, 368 (2d Cir. 1981); *Blackie v. Barrack*, 524 F.2d 891, 906-07 (9th Cir. 1975).

³⁶⁷ See *In re Storage Technology Corp. Sec. Litig.*, 113 F.R.D. 113 (D. Colo. 1986) (relying on fraud-on-the-market theory as well as a common scheme to certify broad securities fraud class action).

³⁶⁸ See *Shores v. Sklar*, 844 F.2d 1485, 1489 (11th Cir. 1988) (allowing certification, finding typicality in fraud-on-the-market type case where the representative did not receive offering materials); *Ross v. Bank S.*, 837 F.2d 980, 990-91 (11th Cir. 1988) (finding typicality despite concurrent reliance of one representative on oral statements of broker and fraud-on-the-market); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 722-23 (11th Cir. 1987) (finding typicality satisfied in a fraud-on-the-market action despite possible individual reliance on oral representations by broker); *Sheftelman v. Jones*, 667 F. Supp. 859, 863-64 (N.D. Ga. 1987) (finding representative's claims typical based on fraud-on-the-market theory, despite allegations that his additional individual misrepresentation claim made him atypical and he could not adequately represent those who had not read the offering materials); *Nelsen v. Craig-Hallum, Inc.*, 659 F. Supp. 480, 486 (D. Minn. 1987) (finding typicality when some of the plaintiffs relied on same oral and written representations of broker to the class; "fraud-on-the-market" created a presumption of reliance).

representative's claim—that the deception caused general reliance on inflated market conditions—inures to the benefit of the class by providing motivation to litigate and to settle. An additional claim by the representative does not modify this analysis.

3. Unique Defenses

The defendant can rebut the presumption of reliance by presenting evidence that the individual representative did not rely on the market, the claimed misrepresentation, or the nondisclosure. These are labeled “unique defenses,” which defendants argue defeat typicality.

Most importantly, unique defense situations do not necessarily fail the *General Telephone*³⁶⁹ standard. The representative in a unique defense situation is still presenting all of the elements of the fraud claim which are identical to and inure to the benefit of the class. The class claims are encompassed within the representative's claim, and both identity of claims and *General Telephone* are satisfied.

Unique defenses focus on a separate issue: whether the claims will be competently presented given the unique situation of the representative. If the unique defense causes the focus to be on this question, the case for the class may be weakened and inadequately presented. On the other hand, if the claimed unique defense is insignificant in relation to the overall proof of claims, the defense will not affect the representative's overall presentation of the class claims. Because the evaluation of defenses is fact-particularized (the defense will substantially affect the competent presentation of the class claims), there is more difficulty in reconciling the court decisions in this area than in the more objective comparison of representative and class claims under the *General Telephone* standard. There are many recent cases finding that unique defenses both defeat certification³⁷⁰ and do not defeat certification.³⁷¹

³⁶⁹ 457 U.S. 147 (1982).

³⁷⁰ See *Gary Plastic Packaging v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (holding unique defenses against named plaintiff made class certification inappropriate); *Fleck v. Cablevision VII, Inc.*, 763 F. Supp. 622, 625 (D.D.C. 1991) (holding plaintiff subject to unique defense based on difference in reliance rendered atypical); *Rolex Employees Retirement Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 662 (D. Or. 1991) (finding that trust's continued trading in stock after curative disclosures made it atypical of purported class of investors); *Kaplan v. Pomerantz*, 131 F.R.D. 118, 126–27 (N.D. Ill. 1990) (allowing executor of purchaser to represent class of those defrauded by offering materials, but executor could not represent direct purchasers in offering because decedent purchased from market); *Grace v. Perception Technology Corp.*, 128 F.R.D. 165, 169 (D. Mass. 1989) (holding access to unique information through

personal contact with corporate offices and special meetings rendered two of four named plaintiffs atypical to class); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 455 (S.D.N.Y. 1989) (holding access to special information not available to rest of class made claim by underwriter atypical to class because of differences in reliance); *Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989) (rejecting named representative because inside information made him subject to unique defenses regarding reliance); *Katz v. Comdisco, Inc.*, 117 F.R.D. 403, 407-08 (N.D. Ill. 1987) (finding that one representative sold more shares than he purchased during period of nondisclosure and was, therefore, not typical); *Irvin D. Schermer Trust v. Sun Equities Corp.*, 116 F.R.D. 332, 337 (D. Minn. 1987) (holding that because plaintiff was a sophisticated investor and considered defendant a "greenmailer," he was precluded from being sufficiently typical of class); *Kamerman v. Ockap Corp.*, 112 F.R.D. 195, 197 (S.D.N.Y. 1986) (finding antagonism toward company rendered named representative atypical because subject to unique defenses); *Kas v. Financial Gen. Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1985) (denying certification because of atypical defenses applicable to representative); *Masri v. Wakefield*, 106 F.R.D. 322, 324 (D. Colo. 1984) (holding that substantial defenses unique to the named representatives and perceived conflict within proposed class precluded typicality and adequate representation); *Beebe v. Pacific Realty Trust*, 99 F.R.D. 60, 72-73 (D. Or. 1983) (finding arbitrageurs were atypical and could not be certified because of differing motivations for purchase in fraud action surrounding tender offer); *McNichols v. Loeb Rhoades & Co.*, 97 F.R.D. 331, 340 (N.D. Ill. 1982) (holding critical unique defenses to both representatives defeated typicality and prevented adequate representation).

³⁷¹ See *Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112, 1118 (4th Cir. 1989) (certifying class because reliance not an element of proxy fraud claim); *Fry v. UAL Corp.*, 136 F.R.D. 626, 631-34 (N.D. Ill. 1991) (allowing two professional investors to represent class of all investors in stock and sellers of puts, despite allegations of nonreliance on the market and sophistication disparity); *Moskowitz v. Lopp*, 128 F.R.D. 624, 628 (E.D. Pa. 1989) (holding typicality satisfied even though named plaintiff was takeover arbitrageur who was alleged not to have relied on integrity of market); *Harman v. LyphoMed, Inc.*, 122 F.R.D. 522, 527-28 (N.D. Ill. 1988) (deeming representative who purchased some stock after partial disclosure typical with all purchasers before full disclosure); *Gorsey v. I.M. Simon & Co.*, 121 F.R.D. 135, 138-39 (D. Mass. 1988) (finding differences in reliance did not defeat typicality); *Goldwater v. Alston & Bird*, 116 F.R.D. 342, 347-48 (S.D. Ill. 1987) (holding unique defenses such as nonreliance on market and disregard of the offering materials deemed not to defeat typicality); *Weinberger v. Thornton*, 114 F.R.D. 599 (S.D. Cal. 1986) (allowing certification of single class represented by one purchaser from the market and one from public offering; certified pendent state law claims finding that typicality did not require similarity of reliance or damages); *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 788 (N.D. Ill. 1984) (holding unique defenses such as being a sophisticated investor or reliance on third party sources did not defeat typicality in securities fraud case in which fraud-on-the-market created presumption of class reliance); *Zeffiro v. First Pa. Banking & Trust Co.*, 96 F.R.D. 567, 569-70 (E.D. Pa. 1983) (finding

4. *Pendent State Law Claims*

Pendent state common-law claims create a troublesome issue in security class actions. In general, the courts refuse to certify unless the fraud-on-the-market theory is applicable to the state claim.

The refusal to certify such claims is proper because “[u]nder a common law fraud claim, each plaintiff must demonstrate his individual reliance upon defendants’ misstatements. . . . Since individual, not common issues, predominate with respect to . . . common law fraud claims [certification is not appropriate].”³⁷² One court declined to certify even though there was no constitutional bar to applying the law of the forum state to the claims because “class members have a significant interest in individually controlling the prosecution of these tort claims in the forum of their choice because of the significant variations in state law with regard to the alleged common law torts.”³⁷³

Another court found that state claims could not be certified because they “would require application of the standards . . . of the state in which each purchase was transacted.”³⁷⁴ However, some courts have allowed pendent state claims for fraud,³⁷⁵ negligent misrepresentation,³⁷⁶ or both.³⁷⁷

typicality not defeated when alleged defense affected ultimate right to recover, not the presentation of liability issue).

³⁷² *Gavron v. Blinder Robinson & Co.*, 115 F.R.D. 318, 325 (E.D. Pa. 1987); *see also In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 220–21 (D. Minn. 1986) (finding typicality in Rule 10(b)-5 action despite possible defenses regarding reliance but holding common-law fraud and negligent misrepresentation not certifiable because of variation in applicable state law); *McFarland v. Memorex Corp.*, 96 F.R.D. 357 (N.D. Cal. 1982) (allowing purchasers in initial public offering to represent purchasers from the market but not allowing certification of pendent state law claims in broad securities fraud action).

³⁷³ *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. at 223.

³⁷⁴ *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987).

³⁷⁵ *See Fry v. UAL Corp.*, 136 F.R.D. 626, 631 (N.D. Ill. 1991); *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986).

³⁷⁶ *See Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 379–80 (D. Del. 1990); *In re IGI Sec. Litig.*, 122 F.R.D. 451, 461–62 (D.N.J. 1988); *Weinberger v. Thornton*, 114 F.R.D. 599, 606 (S.D. Cal. 1986).

³⁷⁷ *See In re Bank of Boston Corp. Sec. Litig.*, 762 F. Supp. 1525, 1535 (D. Mass. 1991); *In re VMS Sec. Litig.*, 136 F.R.D. 466, 480 (N.D. Ill. 1991); *Adair v. Sorenson*, 134 F.R.D. 13, 20 (D. Mass. 1991); *In re Boardwalk Marketplace Sec. Litig.*, 122 F.R.D. 4, 8 (D. Conn. 1988); *In re ORFA Sec. Litig.*, 654 F. Supp. 1449, 1458–64 (D.N.J. 1987).

A few cases certify pendent state claims without a fraud-on-the-market theory, citing misleading course of conduct language.³⁷⁸ These cases are inconsistent with *General Telephone*.³⁷⁹ The representative cannot prove reliance under state law for the entire class, and the claims become subject to proof deficiencies and settlement manipulation without protection for the rights of absent state class members.³⁸⁰

D. Breach of Contract

In breach of contract cases, federal courts have closely followed the *General Telephone*³⁸¹ standard. Thus, "[i]f proof of the representatives' claims would not necessarily prove all of the proposed class members' claims, the representatives' claims are not typical of the proposed members' claims."³⁸² Applying this principle, the representative and the class must be complaining under identical contracts³⁸³ and the same breaches of contract must be averred.³⁸⁴

³⁷⁸ See *In re VMS Sec. Litig.*, 136 F.R.D. at 480; *Adair*, 134 F.R.D. at 20; *In re Boardwalk Marketplace Sec. Litig.*, 112 F.R.D. at 8.

³⁷⁹ 457 U.S. 147 (1982).

³⁸⁰ A court might address this problem by limiting the issues in the state class action to elements other than reliance and damage. If the notice informs of deficiencies in representation on certain issues, court directed notice and opportunity to appear or to opt out may provide adequate protection.

³⁸¹ 457 U.S. 147 (1982).

³⁸² *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990) (citing *Am/Comm Systems, Inc. v. American Tel. & Tel. Co.*, 101 F.R.D. 317, 321 (E.D. Pa. 1984)).

³⁸³ *Id.* at 58; see also *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665 (D. Kan. 1989) (allowing former employee to represent class including current employees in fraud and breach of contract action against employer in computation of compensation); *Committee of Blind Vendors v. District of Columbia*, 695 F. Supp. 1234 (D.D.C. 1988) (allowing leaders of business association to represent class because claims based on statutory and contract violations common to class); *Thonen v. McNeil-Akron, Inc.*, 661 F. Supp. 1271, 1273-74 (N.D. Ohio 1986) (limiting class, excluding plaintiffs who had not signed accord and satisfaction agreements altering health coverage during retirement); *Perez v. Government of Virgin Is.*, 109 F.R.D. 384, 387 (D.C.V.I. 1986) (holding no common issues in which various policy holders and those with claims against holder sued government concerning a collapsed insurance company).

³⁸⁴ See *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1128 (D.N.J. 1989) (holding class allegations that defendant extorted confessions and payments lacked commonality and typicality); *Jeannides v. United States Home*, 114 F.R.D. 29, 30 (N.D. Ill. 1987) (deeming breach of contract to construct home too individual and atypical to

Because breach of contract claims are governed by state law, courts also require that the claims of the representative and the class be governed by the same law. "The absence of one uniform law applicable to all of the class members' contractual claims will potentially result in as many separate adjudications as there are states whose law governs the various members' contractual claims."³⁸⁵ Such differences in the law applicable to the class will defeat certification.

X. THE IMPACT OF *GENERAL TELEPHONE* ON SPECIFIC CASES AND DECISIONS

A. *Civil Rights Employment Discrimination*

The impact of *General Telephone* is substantial and clear in employment discrimination cases. Across-the-board discrimination allegations are not permitted. The representative must establish that the same specific injuries suffered by the representative are also suffered by the class.³⁸⁶

authorize class certification); *Wucina v. Reliance Elec. Co.*, 129 F.R.D. 164, 168-69 (N.D. Ill. 1986) (holding different dates of layoff precluded class treatment because each required a separate interpretation of collective bargaining agreement and alleged breaches thereof).

³⁸⁵ *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 98 F.R.D. 254, 266 (D. Del. 1983).

³⁸⁶ See *Coon v. Georgia Pac. Corp.*, 829 F.2d 1563, 1566-67 (11th Cir. 1987) (refusing to certify single representative who alleged discrimination in promotion and, based on bare allegations, attempted to certify an across-the-board discrimination case); *Briggs v. Anderson*, 796 F.2d 1009, 1017 (8th Cir. 1986) (affirming decertification of two subclasses (applicants and terminated employees) prior to ruling on merits due to a lack of motion to certify and lack of representation); *Griffin v. Carlin*, 755 F.2d 1516, 1531-32 (11th Cir. 1985) (certifying a class of those adversely affected in advancement in case challenging multicomponent promotion process of discrimination in post office); *Adams v. Bethlehem Steel Corp.*, 736 F.2d 992, 994 (4th Cir. 1984) (refusing to certify broad class in employment discrimination case based on "mere existence" theory of class-wide harm); *Nelson v. United States Steel Corp.*, 709 F.2d 675, 678-80 (11th Cir. 1983) (refusing to certify without any proof of Rule 23 factors); *Wheeler v. City of Columbus*, 703 F.2d 853, 854-55 (5th Cir. 1983) (refusing to certify across-the-board class when plaintiff only alleged discrimination in its widest sense); *McKenzie v. Sawyer*, 684 F.2d 62, 74 (D.C. Cir. 1982) (allowing journeymen to represent class that included those seeking promotion beyond journeymen because typicality satisfied when similar employment practices applied to related employment decisions); *Oxman v. WLS-TV*, 595 F. Supp. 557, 561 (N.D. Ill. 1984) (raising concern over ability of a white person with Jewish heritage to be adequate representative for blacks allegedly discriminated against based on race); *Minority Police Officers Ass'n v. City of South Bend*, 555 F. Supp. 921, 925 (N.D. Ind. 1983) (refusing to

This showing must include injury to the representative and injury to the class with a "sameness" or nexus between the representative and the class injury.³⁸⁷ A plaintiff whose individual claims are without substance cannot be a representative.³⁸⁸

Lack of claim identity may require a narrowing of the class³⁸⁹ or the creation of subclasses, each with an appropriate representative.³⁹⁰ If each claim is unique and individual, certification will not be granted.³⁹¹ Illustrative of

certify claims of proposed class because of vagueness and lack of injury to representatives); *Penk v. Oregon State Bd. of Higher Educ.*, 99 F.R.D. 508, 509-10 (D. Or. 1982) (allowing broad sex discrimination case to proceed only so far as a named representative had suffered each injury alleged in the class); *Jackson v. City of Belle Glade*, 95 F.R.D. 384, 386 (S.D. Fla. 1982) (refusing to find typicality based merely on common racial background absent proof of a harm typical to the representatives and class members).

³⁸⁷ See *Chaffin v. Rheem Manufacturing Co.*, 904 F.2d 1269, 1276 (8th Cir. 1990) (denying certification where anecdotal and statistical evidence did not raise an inference of class claims); *Gonzalez v. Brady*, 136 F.R.D. 329, 330-31 (D.D.C. 1991) (holding lack of showing that others in class were discriminated against precluded class certification); *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO v. LTV Aerospace & Defense Co.*, 136 F.R.D. 113, 120-25 (N.D. Tex. 1991); *Price v. Cannon Mills*, 113 F.R.D. 66, 68 (M.D.N.C. 1986) (finding failure to show class harmed in same way as plaintiff in sex discrimination action rendered claim atypical); *Washington v. Brown & Williamson Tobacco Corp.*, 106 F.R.D. 592, 594 (M.D. Ga. 1985) (holding class not certified because representative showed no nexus to the class); *Lawson v. Metropolitan Sanitary Dist.*, 102 F.R.D. 783, 791-92 (N.D. Ill. 1983) (limiting class to persons who experienced enumerated types of employment discrimination during preceding five years).

Reverse discrimination suits also require identity of claims. See *Majeske v. City of Chicago*, 740 F. Supp. 1350, 1357 (N.D. Ill. 1990) (requiring subclasses or, in the alternative, limiting class to white officers to protect all interests involved before certifying reverse discrimination case); *Sperling v. Donovan*, 104 F.R.D. 4, 6 (D.D.C. 1984) (denying certification of class of white employees in reverse discrimination case because across-the-board racial allegations did not satisfy Rule 23 requirements).

³⁸⁸ See *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 906 (5th Cir. 1977) (holding plaintiff whose individual claims were found groundless could not represent class).

³⁸⁹ See *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1409 (D.C. Cir. 1988) (narrowing class in racial employment discrimination suit to exclude challenge to job requirement of high school diploma because of named plaintiffs injured by that requirement).

³⁹⁰ See *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982) (allowing use of subclasses, each represented, to deal with multiclaim employment discrimination class action).

³⁹¹ See *Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986) (tenure decisions turning on unique facts not typical to any one member of class); *Grimes v.*

these principles are cases from the Fourth and Fifth Circuits. In *Holsey v. Armour & Co.*,³⁹² the court restricted a class of office and management employees to those in sales and supervisory positions because a wider class "encompassed" jobs for which no representative or evidence was presented.³⁹³ Similarly, in *Everitt v. City of Marshall*,³⁹⁴ an employment discrimination case, the court held that the plaintiff could not represent the class because the plaintiff was not subject to discrimination in the same areas as the class.³⁹⁵

The identity requirement normally means that the job status of the representative and the class must be identical.³⁹⁶ For example, those who were hired cannot represent applicants who were not employed.³⁹⁷

A representative who applied for and was denied promotion cannot represent those who did not apply for promotion.³⁹⁸ Thus, if the representative

Pitney Bowes Inc., 100 F.R.D. 265, 267-70 (N.D. Ga. 1983) (refusing to certify because of individuality of claims and defenses).

³⁹² 743 F.2d 199 (4th Cir. 1984).

³⁹³ *Id.* at 215-16.

³⁹⁴ 703 F.2d 207 (5th Cir. 1983).

³⁹⁵ *Id.* at 210-11.

³⁹⁶ *See Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 139 (1st Cir. 1985) (racial discrimination in hiring action in which class limited to applicants or applicants for transfer to same welding job as named plaintiff).

³⁹⁷ *See Wagner v. Taylor*, 836 F.2d 578, 588-94 (D.C. Cir. 1987) (holding allegation of bias in performance rating system insufficient to allow plaintiff to represent class that included disappointed job applicants because they were not subjected to performance rating system); *Fleming v. Travenol Labs., Inc.*, 707 F.2d 829, 832-33 (5th Cir. 1983) (holding hired female plaintiff in sex discrimination case could not represent class that included applicants for employment, transfer, and promotion because she had no claim in those areas); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1346-47 (11th Cir. 1983) (declining to include applicants in class in Title VII case involving discrimination in advancement and layoff procedures); *Talley v. Leo J. Shapiro & Assocs.*, 713 F. Supp. 254, 257 (N.D. Ill. 1989) (limiting employment discrimination claims by employees to those actually hired and excluded applicants not actually employed); *Calloway v. Westinghouse Elec. Corp.*, 642 F. Supp. 663, 670-72 (M.D. Ga. 1986) (limiting class in employment discrimination case to those current or future employees at facility, excluding those who merely applied or would apply); *cf. Rodriguez v. United States Dep't of Treasury*, 131 F.R.D. 1, 7 (D.D.C. 1990) (declining to include discouraged applicants because of their speculative existence caused class to fail on numerosity); *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1408 (D. Minn. 1987) (allowing expansion of employment discrimination class action to include rejected applicants and approving negotiated settlement agreement over objection of five named plaintiffs and others citing cases); *Ladele v. Consolidated Rail Corp.*, 95 F.R.D. 198, 200-04 (E.D. Pa. 1982) (rejecting certification of across-the-board class in employment discrimination action because named plaintiff, a former employee, could not represent rejected applicants).

was injured by denial of promotion, only class promotion claims will be certified.³⁹⁹ A discharged employee cannot represent those who were not hired.⁴⁰⁰ A representative applicant cannot represent those who did not apply.⁴⁰¹ Further, employees in one location cannot sue as representatives of employees of other locations, absent a showing of identity of policy, decisionmaking, and claims.⁴⁰²

³⁹⁸ See *Mayfield v. Meese*, 704 F. Supp. 254 (D.D.C. 1988) (declining to expand class represented by plaintiff who did not apply for promotion to include those who applied for promotion); *Rosario v. Cook County*, 101 F.R.D. 659 (N.D. Ill. 1983) (holding representatives who alleged discrimination in promotion could not represent those deterred from applying); *Allen v. Isaac*, 99 F.R.D. 45, 52-55 (N.D. Ill. 1983) (class disparate impact claims based on FDIC examination used for advancement; limiting class to those actually taking the exam and receiving unsatisfactory marks, not those "chilled" from taking the examination); *Warren v. ITT World Communications, Inc.*, 95 F.R.D. 425, 429 (S.D.N.Y. 1982) (holding named representative in sex discrimination in employment case could not represent class of those denied promotions because she never sought promotion).

³⁹⁹ See *Roby v. St. Louis S.W. Ry.*, 775 F.2d 959, 961 (8th Cir. 1985) (affirming decertification of broad employment discrimination class action as representatives did not have claims sufficiently typical of those of the proposed class and claims regarding promotion by those who failed examination not typical of those not promoted for violation of company rules); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 332-34 (4th Cir. 1983) (allowing class to include those discriminated against in promotion only after intervention by named representatives who claimed to have been subject to such discrimination); *Evans v. United States Pipe & Foundry Co.*, 696 F.2d 925, 928-30 (11th Cir. 1983) (refusing to certify proposed across-the-board class action but remanding for consideration of numerosity of class limited to those adversely impacted by discrimination in promotion); cf. *Wakefield v. Monsanto Co.*, 120 F.R.D. 112, 115-17 (E.D. Mo. 1988) (limiting class to black nonexempt employees who received discriminatory treatment in pay and promotion; court saw no conflict between present and former employees); *Shafer v. Commander, Army & Air Force Exch. Serv.*, 667 F. Supp. 414, 432 (N.D. Tex. 1985) (limiting class to promotion and job assignment claims and allowing broad challenge to "mobility policy" because it had same effect on all female employees).

⁴⁰⁰ See *O'Neal v. Riceland Foods*, 684 F.2d 577, 581 (8th Cir. 1982) (refusing to allow discriminatorily discharged plaintiff to represent claims of discrimination in hiring when evidence revealed representative had no claim).

⁴⁰¹ See *Harris v. General Dev. Corp.*, 127 F.R.D. 655, 659-60 (N.D. Ill. 1987) (limiting class to those who actually applied and were rejected because applicants were not typical of those discouraged from applying).

⁴⁰² See *Adames v. Mitsubishi Bank*, 133 F.R.D. 82, 88-90 (E.D.N.Y. 1989) (limiting class of non-Oriental and non-Japanese employees in discrimination claim to employees of New York office).

B. *Biased Testing Procedure Decisions*

Footnote fifteen of *General Telephone*⁴⁰³ illustrates how evidence of a biased testing procedure supporting the representative's claim might establish the class claim so as to meet the "fairly encompassed" standard, even when different job categories are involved.⁴⁰⁴ In the Court's example, the representative and class complain about the same act, defendant's use of a written testing procedure, which is allegedly biased.⁴⁰⁵ The representative is motivated and has evidence to prove the biased testing procedure. The evidence supports the claims of all members of a class who have been injured by the same testing procedure although each class member must establish his or her own damage. The self-interest of the representative, including motivation to litigate, submit proof, or negotiate settlement, inures to the benefit of the class.⁴⁰⁶ This example is analogous to single act cases and is simply an application of historical identity of claims principles.⁴⁰⁷

C. *General Policy/Subjective Decisionmaking Cases*

After repeatedly stressing the requirement of same and encompassed claims and explicitly rejecting across-the-board certification, the Supreme Court added the following ambiguous language to footnote fifteen of *General Telephone*:⁴⁰⁸

Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII

⁴⁰³ 457 U.S. 147 (1982).

⁴⁰⁴ If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). *Id.* at 159 n.15.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ See *Huguley v. General Motors Corp.*, 638 F. Supp. 1301, 1302-03 (E.D. Mich. 1986) (holding that varying factual circumstances among class members would not defeat typicality if all complained of the discriminatory effect of employee performance appraisal system); *Wilmington Firefighters Local 1590 v. City of Wilmington*, 109 F.R.D. 89, 91 (D. Del. 1985) (finding typicality satisfied in reverse discrimination suit because all applicants for promotion were subject to the same testing procedures).

⁴⁰⁸ 457 U.S. 147 (1982).

prohibits discriminatory employment *practices*, not an abstract policy of discrimination.⁴⁰⁹

This language will hereafter be referred to as the general policy exception. Some commentators have interpreted the language as opening the back door to across-the-board claims involving different acts, injuries, job categories, and locations, so long as the representative alleges a general policy carried out by subjective decisionmaking.⁴¹⁰

If the general policy exception is satisfied by mere allegation, any sweeping class action may be certified regardless of disparate acts, jobs, or injuries. Of course, many, if not most, discrimination cases involve subjective decisionmaking, and the accusation of a "general policy" of discrimination is easy to make. However, the hundreds of cases cited denying certification based on *General Telephone* establish that no such loose interpretation has been or should be given to the general policy exception.

In 1986, the Second Circuit observed the strictness with which courts follow *General Telephone*.⁴¹¹ This strict approach requires the following:

(1) Evidence, at the certification hearing, that there was one central policy of discrimination. Therefore, evidence of a valid individual claim, a mere averment, or a claimed presumption does not establish a general policy. Evidence of general intent submitted by the class representative inures to the benefit of the class and encompasses the class claim.

(2) The policy decisions must have been made by a single centralized management. If policy decisions were decentralized or made by different groups of people, the general policy exception does not apply.⁴¹²

⁴⁰⁹ *Id.* at 159 n.15.

⁴¹⁰ See Strickler, *supra* note 205, who concluded that the *General Telephone* decision has not resulted in the demise of the broadly based class action. *Id.* at 137-41. Debra A. Millenson, *The Practical Labor Lawyer*, 8 EMPL. REL. L.J. 526 (1983), suggests that footnote 15 is the most significant part of *General Telephone*. *Id.* at 531.

⁴¹¹ *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 597 (2d Cir. 1986).

⁴¹² See *Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792, 795 (5th Cir. 1982) (holding class certification was improper without an evidentiary hearing in as much as each Sears store established its own separately supervised operating procedures and personnel policies); *Rosenberg v. University of Cincinnati*, 654 F. Supp. 774, 776-77 (S.D. Ohio 1986) (holding that, without centralized decisionmaking, university-wide sex discrimination case was not certifiable).

(3) The policy decisions were applied by subjective evaluation. If policy decisions were made by established objective personnel procedures or policies, including formal job descriptions, objective experience, education requirements, or posting or listing of job openings, this requirement may not be satisfied. A lack of uniform guidelines relating to hiring, placement, pay, promotion, or discipline supports the establishment of this requirement.⁴¹³

A few cases have met the previously mentioned requirements.⁴¹⁴ Others have directly⁴¹⁵ or indirectly⁴¹⁶ been found to lack one of the three requirements, and certification was denied.

⁴¹³ See *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1198-99 (5th Cir. 1984) (holding reliance on general policy of discrimination exception was misplaced because defendant relied on two "objective inputs" in making hiring decisions).

If there are job descriptions or qualification rules which are not job related and which have a disparate impact on racial or sexual groups, the violation may be established by statistical evidence without proof of intent and does not fall under the general policy cases.

⁴¹⁴ See *Rossini*, 798 F.2d at 596-600 (finding typicality satisfied in sex discrimination action because company used same subjective evaluation system for all members of the class and decisions made by "same central group of people"); *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 622-23 (N.D. Ill. 1989) (certifying claims of sexual discrimination and pervasive sexual harassment in national class of management employees relying on standard operating procedures as a general policy; the focus was on disparate impact and statistical proof); *Anderson v. Douglas & Lomason Co.*, 122 F.R.D. 502, 506 (N.D. Miss. 1988) (certifying class of those denied applications for employment because representatives alleged systematic policy of refusing to give job applications to blacks); *AFSCME v. Court of Nassau*, 664 F. Supp. 64, 67-68 (E.D.N.Y. 1987) (certifying class of female employees alleging discrimination because they were employed in "traditional female jobs," and the case involved one comprehensive plan not based on individual decisions in hiring and promotion); *Selzer v. Board of Educ.*, 112 F.R.D. 176, 178-79 (S.D.N.Y. 1986) (finding typicality satisfied in action by female guidance counselors alleging sex discrimination in selection for administrative and supervisory jobs because affidavits supported their claim that they were discriminated against by the same central group of people applying the same general policy); *Ivy v. Meridian Coca-Cola Bottling Co.*, 108 F.R.D. 118, 122 (S.D. Miss. 1985) (finding typicality satisfied if one general policy of discrimination is established that is manifested through an "entirely subjective decisionmaking process" with ultimate review by the president and secretary-treasurer); *Jordan v. Swindall*, 105 F.R.D. 45, 47-48 (M.D. Ala. 1985) (finding typicality in challenge to discriminatory treatment and impact in advancement and training of police force based on a subjective evaluation process by same persons involving sexual discrimination); *Avagliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562, 567, 573-77 (S.D.N.Y. 1984) (certifying class claiming discrimination in favor of Japanese males); *Brown v. Eckerd Drugs, Inc.*, 564 F. Supp. 1440, 1443-46 (W.D.N.C. 1983) (certifying broad class of black employees in discrimination suit because,

A strict application of the general policy exception does not violate the identity of claims requirements. By showing that there was one general policy of discrimination and that this policy was applied in all subjective decisionmaking, the representative proves and fairly encompasses the class claims. Therefore, the motivation, proof, and incentive to settle is the same between the representative and the class.

D. Civil Rights (Other than Employment Discrimination)

The civil rights cases (other than employment discrimination) follow the standard set by *General Telephone*.⁴¹⁷ If the representative sets forth a claim that fairly encompasses the class claims, certification will follow even if individual damages differ.⁴¹⁸

For example, in *Glover v. Crestwood Lake Section 1 Holding Corps.*,⁴¹⁹ a class challenge to an alleged discriminatory apartment rental policy was

although injuries were different, all were the result of "subjective" decisionmaking process of "overwhelmingly white management/supervisory force" applying one general policy); *Johnson v. Montgomery County Sheriff's Dep't*, 99 F.R.D. 562, 564-65 (M.D. Ala. 1983) (allowing a class sex discrimination attack on behalf of applicants and employees because the hiring, promotion, and transfer policies were interrelated by one general discriminatory policy); *Meyer v. Macmillan Publishing Co.*, 95 F.R.D. 411, 414-15 (S.D.N.Y. 1982) (allowing named plaintiffs complaining of sex discrimination in promotions to represent class that included applicants because affidavits provided "significant proof [of] . . . a general policy of discrimination which pervaded all personnel decisions"); *Richardson v. Byrd*, 709 F.2d 1016, 1019-20 (5th Cir. 1983) (allowing female employee to represent class that included job applicants because the same alleged discriminatory general policy that restricted transfer opportunities limited hiring decisions); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 616-17 (5th Cir. 1983) (allowing hourly employees to represent class that included salaried employees in race and sex discrimination action because discrimination was based on university-wide "channeling policy" involving general discrimination).

⁴¹⁵ See *Nation v. Winn-Dixie Stores, Inc.*, 95 F.R.D. 82, 85-88 (N.D. Ga. 1982) (refusing to certify an across-the-board race discrimination case absent significant proof that the defendant operated under a general policy of discrimination).

⁴¹⁶ See *supra* notes 328-367 and accompanying text.

⁴¹⁷ 457 U.S. 147 (1982).

⁴¹⁸ See *McCarthy v. Kleindienst*, 741 F.2d 1406 (D.C. Cir. 1984); *Taylor v. White*, 132 F.R.D. 636 (E.D. Pa. 1990); *Ashe v. Board of Elections*, 124 F.R.D. 45 (E.D.N.Y. 1989); *Jane B. v. New York City Dep't of Social Servs.*, 117 F.R.D. 64 (S.D.N.Y. 1987); *Vargas v. Calabrese*, 634 F. Supp. 910 (D.N.J. 1986); *Louis M. by Velma M. v. Ambach*, 113 F.R.D. 133 (N.D.N.Y. 1986); *Young v. Pierce*, 628 F. Supp. 1037 (E.D. Tex. 1985); *Fischer v. Dallas Fed. Sav. & Loan Ass'n*, 106 F.R.D. 465 (N.D. Tex. 1985).

⁴¹⁹ 746 F. Supp. 301 (S.D.N.Y. 1990).

certified.⁴²⁰ The *General Telephone* standard was satisfied because a showing was made that the defendant discriminated against the plaintiff using one established policy that discriminated against minorities.⁴²¹ Conversely, some courts have held that if the claims and acts differ between the representative and the class, certification will be denied.⁴²²

XI. CONCLUSION

In 1982, *General Telephone Co. v. Falcon*⁴²³ restored the historic requirement of identity of claims between a representative and a class. Because of the amorphous language of amended Rule 23, a majority of federal courts from 1966 to 1982 decided adequacy of representation (identity of claims) on standards which were at odds with historic principles. Few of the incorrectly decided cases during this period were corrected on appellate review or collateral attack, which illustrates the pragmatic power and danger of ambiguities within a civil rule. Amended Rule 23, as applied from 1966 to 1982, modified the substantive law of due process and identity of claims despite the principle that a federal rule may not abridge, enlarge, or modify any substantive right.⁴²⁴

The historic cases establish that due process requires identity of claims. The Supreme Court in *General Telephone* did not rely on due process but, rather, reinterpreted the "merged" rule requirements of commonality, typicality, and adequacy of representation. It was unnecessary to discuss constitutional due process when rule reinterpretation led to the desired result. Nevertheless, by failing to comment on due process, the Court has left unclear future limits on Federal Rule 23 changes and has left uncertain the identity of claims requirement on state courts under the Fourteenth Amendment Due Process Clause.

⁴²⁰ *Id.* at 305-06.

⁴²¹ *Id.*

⁴²² See *Strykers Bay Neighborhood Council, Inc. v. City of N.Y.*, 695 F. Supp. 1531 (S.D.N.Y. 1988); see also *Bennett v. Westfall*, 640 F. Supp. 169, 170 (S.D.W. Va. 1986) (declining to certify former prisoner representing class of current jail inmates).

⁴²³ 457 U.S. 147 (1982).

⁴²⁴ 28 U.S.C. § 2072(b) (Supp. III 1991).

A. *Common Course of Conduct: Derogations of the General Telephone Precedent*

In *Grasty v. Amalgamated Clothing and Textile Workers Union*,⁴²⁵ the court defined the typicality standard as follows: "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory."⁴²⁶ Typicality was upheld contrary to *General Telephone*, although the named plaintiffs did not share all of the claims of the class.⁴²⁷

Essentially, same course of conduct is too broad a standard and has led to various decisions at odds with the Supreme Court's insistence that the class claims be encompassed within the representative's claims. If the representative personally complains of some misrepresentations or acts causing harm, but did not receive injury from other misrepresentations or acts which injured the class, the self-interest, proof, and incentive to settle the individual representative's claims does not inure to the benefit of the class even if all claims are part of a common course of conduct. It is easy to allege and contend common course of conduct. Every across-the-board employment discrimination case explicitly rejected for certification by the Supreme Court qualifies for certification under the common course of conduct standard. The majority of the hundreds of decisions cited in this paper alleged a common course of conduct, yet certification was denied or qualified as required by *General Telephone*. The misleading language of "course of conduct" should not be cited to nor should identity of claims be substituted.

B. *Same Legal Theory*

In *De La Fuente v. Stokely-Van Camp, Inc.*,⁴²⁸ the court declared that "similarity of legal theory may control even in the face of difference of fact"⁴²⁹ and reached a holding contrary to *General Telephone*.⁴³⁰ This is simply not the

⁴²⁵ 828 F.2d 123 (3d Cir. 1987).

⁴²⁶ *Id.* at 130 (quoting 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.15 at 168 (2d ed. 1985)).

⁴²⁷ *Id.* at 129-30; see also *Garfinkel v. Memory Metals, Inc.*, 695 F. Supp. 1397, 1402-04 (D. Conn. 1988).

⁴²⁸ 713 F.2d 225 (7th Cir. 1983).

⁴²⁹ *Id.* at 232.

⁴³⁰ See also *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1336 (S.D.N.Y. 1988) (stressing that identical legal theories satisfy typicality).

law. *General Telephone* and the cases applying it have rejected certification although the same legal theory was involved.

C. *Markedly Different Positions*

Some courts have defined typicality by adopting a “markedly different position” test. Wright, Miller, and Kane discussed this test as follows: “On the other hand, Rule 23(a)(3) may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are raised.”⁴³¹ Exactly when a position is “markedly different” is left undefined and uncertain. The test refers to positions, not claims. Under this standard, the representative with one claim may represent unrelated class claims so long as the factual positions on the unrelated claims are similar. However, the class is not thereby protected by the self-interest of the representative claimant. *General Telephone* requires identity of claims, not positions, so the markedly different position terminology should no longer be used.

Indeed, in the light of this study, all cases defining typicality and adequacy of representation between 1966 and 1982 are suspect and should be analyzed under the *General Telephone* standard. Because some post-*General Telephone* decisions have continued to employ overly broad language inconsistent with the identity of claims requirement, the following is suggested to correct overbroad certification:

- (1) Findings of facts on adequacy of representation (identity of claims) should be required in conjunction with all class certification.
- (2) Such findings, when reviewed by appellate courts, should be subject to an error of law standard, not an abuse of discretion standard, because constitutional due process is at issue.⁴³² Specific findings would also facilitate collateral attack based on due process violations.

⁴³¹ WRIGHT ET AL., *supra* note 119, § 1764; *see also* Wofford v. Safeway Stores, Inc., 78 F.R.D. 460 (N.D. Cal. 1978).

⁴³² Class certification is interlocutory and not subject to immediate review, but may come before the appellate court in conjunction with collateral orders, preliminary injunctions, or judgments following trial or settlement.

(3) In a complex case, magistrates or masters should be appointed to evaluate identity of claims and prepare the necessary findings for court approval.

XII. A POSTSCRIPT FOR PERSPECTIVE

With regard to the issue of representation (identity of claims) in postcertification stages, it is important to note the following:

(1) The role of the named representatives has steadily and significantly diminished; the representatives may not be consulted on settlement or trial decisions and may be disregarded by the court if they object to a settlement.⁴³³

(2) In pre-certification class settlements (negotiated by counsel) in which certification is combined with settlement approval, adequacy of representation (identity of claims) is largely ignored.⁴³⁴

(3) In both pre- and post-certification settlement hearings, notice of hearing does not mention that adequacy of representation is a possible basis of objection, and the issue of adequate representation is not explicitly considered in conjunction with settlement approval.⁴³⁵ Even if objections concerning adequacy are raised, discovery on the process of settlement negotiation is not permitted⁴³⁶ and objections are seldom effective.⁴³⁷

⁴³³ See *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956 (3d Cir. 1983); *Laskey v. UAW*, 638 F.2d 954 (6th Cir. 1981); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977).

⁴³⁴ See *Clark Equip. Co. v. International Union Allied Indus. Workers*, 803 F.2d 878 (6th Cir. 1986).

⁴³⁵ See *Van Horn v. Trickey*, 840 F.2d 604 (8th Cir. 1988); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979), *aff'd in part, rev'd in part*, 645 F.2d 488 (5th Cir. 1981); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

⁴³⁶ See *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 683-84 (7th Cir. 1987); see also *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

⁴³⁷ See *Walsh*, 726 F.2d at 964-65; see also *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979).

(4) In many instances, the specific plan of distribution is not disclosed in conjunction with settlement approval, and, accordingly, preferences and conflicts of interest are left undisclosed.⁴³⁸

(5) Appellate review of class settlement is by an abuse of discretion standard, even as to challenges of lack of due process.⁴³⁹

(6) The binding effect of class settlement continues to expand and includes claims which were or should have been litigated.⁴⁴⁰

Thus, before celebrating the enhanced protection of class members resulting from *General Telephone*, the legal community should consider the weakening of protection for absent members in the postcertification stages and particularly in settlement processes.

⁴³⁸ See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435 (9th Cir. 1987); *Huquley v. General Motors Corp.*, 128 F.R.D. 81 (E.D. Mich. 1989), *aff'd*, 925 F.2d 1464 (6th Cir. 1991).

⁴³⁹ See generally *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145; *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435; *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128 (8th Cir. 1984); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981).

⁴⁴⁰ See *Laskey v. UAW*, 638 F.2d 954, 954 (6th Cir. 1981) (holding objectors who failed to appeal settlement were "collaterally estopped" from subsequent attack); see also *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499 (N.D. Ala. 1991).

